82-1506

No.

FILED

MAR 3 1983

ALEXANDER L. STEVAS,

In the Supreme Court of the United States

OCTOBER TERM, 1982.

JOHN A. MARKEY, et al.
PETITIONERS,

v.

LYNDA LeBOEUF COSTA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

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Questions Presented.

1. In a Title VII employment discrimination case, whether a female Plaintiff can establish a prima facie case of disparate impact when the applicant pool consists solely of women.

2. Whether the remedy of back pay and other retroactive relief is warranted where a Title VII defendant engaged in conduct which was aimed at promoting affirmative action goals.

List of Parties.

The plaintiff was identified in the complaint as "Lynda L. LeBoeuf (Costa)." The named defendants were: "John A. Markey, in his capacity as Mayor of the City of New Bedford; Joseph A. Pelletier, in his capacity as Chief of Police in the City of New Bedford; Rosalind Pool Brooker, Brian Lawler, Donald R. Perry, George Rogers, William Saltzman, Paul G. Hamel, Richard Bachand, David R. Nelson, Richard W. Hinkley, Manuel F. Neto, Ralph J. Saulnier, in their capacity as City Councillors for the City of New Bedford; Nancy Beecher, Wayne A. Budd, Richard J. Healey, Richard Linden, John Donegan, in their capacity as Commissioners on the Massachusetts Civil Service Commission; Ann Ramsey, in her capacity as Acting Personnel Administrator in the Massachusetts Executive Office for Administration and Finance."

Only those defendants who are officials of the City of New Bedford are represented in this petition.

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No.

In the Supreme Court of the United States

OCTOBER TERM, 1982.

JOHN A. MARKEY, et al.
PETITIONERS,

v.

LYNDA LeBOEUF COSTA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered on December 3, 1982.

Opinions Below.

The opinion of the United States District Court for the District of Massachusetts is reported: *LeBoeuf v. Ramsey*, 503 F.Supp. 747 (D. Mass. 1980), and is reprinted in the Appendix at page A38.

The opinion of the original appellate panel of the United States Court of Appeals for the First Circuit is reported, *Costa v. Markey*, 672 F.2d 158 (1st Cir. 1982), and reprinted at appendix A19.

The opinion of the rehearing panel of the United States Court of Appeals for the First Circuit is reported, *Costa v. Markey*, 694 F.2d 876 (1st Cir. 1982) and reprinted at appendix A2.

Jurisdiction.

The latest judgment of the court of appeals, on rehearing, was entered on December 3, 1982 and a copy is appended to this petition in the Appendix at page A1. The jurisdiction of this court is invoked under 28 U.S.C. 1254 (1).

Statute Involved.

The statute involved is § 703(a) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2(a) (1976). The pertinent parts are set forth below:

> It shall be an unlawful employment practice for an employer —
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Statement of the Case.

In the Spring of 1973, the City of New Bedford (City), in accordance with then existing State Law, requested the Division of Civil Service to hold an examination for the position of policewoman, for which it had an opening. At this time men and women police employees held distinct positions with different duties and separate exams were administered for each. All appointments to the New Bedford Police depart-

ment were subject to the Massachusetts Civil Service law, rules, regulations and practices.

The State did not hold such an exam, but instead in July 1974 the Division of Civil Service provided a list of qualified male and female applicants, ranked according to their scores on an exam administered in 1972 for the integrated position of "police officer." The city conducted interviews and hired a number of male candidates, but no women were hired because none had placed high enough on the list to be reached. No man was hired who had placed lower than any woman.

Since the city had a continuing need for a female police officer (to fill the special duties that could only be performed by a woman), the city sought and obtained another list from the Division of Civil Service, this one consisting of *only women*. This was accomplished only after special permission was granted by the Massachusetts Commission Against Discrimination for gender specific hiring. Plaintiff was listed first on this all-female list, but was rejected because she failed to meet the 5 foot 6 inch height requirement. Two other women were appointed who ranked below the Plaintiff, both of whom were taller than 5 feet 6 inches.

Plaintiff filed a charge of discrimination with the proper state and federal agencies and then commenced this action in the United States District Court for the District of Massachusetts. Federal jurisdiction was predicated on 28 U.S.C. §§ 1331, 1343 (3) and (4), and 42 U.S.C. § 2000e-5(f). At her trial, Plaintiff introduced statistics which proved that over 80% of all women were shorter than 5 feet 6 inches while only 20% of men were shorter than that height. Although the relevance of these statistics was objected to, the trial judge found that they proved a prima facie case of disparate impact employment discrimination. The trial judge expressly found, however, that the height requirement was not imposed with a discriminatory purpose. Judgment entered for the Plaintiff and back pay, attorney fees and reinstatement was awarded.

The city appealed to the Court of Appeals for the First Circuit which reversed the District Court in a unanimous opinion (Appendix at A19). The crux of this first appellate decision was the observation that it was factually impossible for the plaintiff to establish a prima facie case of employment discrimination given the fact that she was in competition with only women. "The height [requirement] does its dirty work only when there are males . . . to prefer. Absent this role of disproportionate preferment, the factor no longer distinguishes between sexes. . . ." *Costa v. Markey*, 677 F.2d 158, 160 (1st Cir.) *rev'd* 694 F.2d 876 (1st Cir. 1982).

Plaintiff, during the course of this first appeal relied heavily on the Second Circuit's decision in *Teal v. Connecticut*, 645 F.2d 133 (2d Cir. 1981), *aff'd*, ____ U.S. ____, 102 S. Ct. 2525 (1982). The First Circuit rejected the plaintiff's application of *Teal* because it was factually inapposite and because it invited scrutiny of every facet of a hiring process where the end result revealed no evidence discrimination. Shortly thereafter, this Court affirmed *Teal* and the plaintiff petitioned the First Circuit for a rehearing, which was granted. On December 3, 1982 the rehearing panel announced its decision in three separate opinions, reversing the original appellate decision and reinstating the District Court's judgment. The majority opinion stated, as the foundation for its reasoning:

> In this case the city applied the requirements to women only and hired only women. But this is no defense to a prima facie case of disparate impact discrimination. It seeks to justify the disparate effect of the rule in general by pointing to the end results of one particular application of the rule. This is the "bottom line" approach which is proscribed by *Teal*.

Costa v. Markey, 694 F.2d 876, 880 (1st Cir. 1982).

Reasons for Granting the Writ.

Certiorari should be granted in this case because the Court of Appeals for the First Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision, and because there has arisen a conflict of decision between two Courts of Appeals on the same question.

The same circumstances as the instant case arose in *Stroud v. Delta Air Lines, Inc.*, 544 F.2d 892 (5th Cir.), *cert. denied* 434 U.S. 844 (1977) when a former stewardess claimed that the employer's no-marriage rule constituted sex discrimination. Because only women were employed as flight attendants, the Fifth Circuit found no violation of Title VII:

> Plaintiff is not a member of one of the relevant, identifiable classes which has been discountenanced in favor of another such class. Rather, certain women — stewardesses who are unmarried — are favored over certain other women — stewardesses who are married. As one of the all female-group of flight attendants employed by Delta, Plaintiff suffered a discrimination, but it was based on marriage and not sex. Men were not favored over women; they simply were not involved in the functioning of the policy.

Id. at 893. Secondly, the First Circuit has ruled that this Court's holding in *Connecticut v. Teal*, ___ U.S. ___, 102 S.Ct. 2525 (1982), virtually dictates the abrogation of prima facie cases analysis in Title VII cases. This is simply not true and is an unwarranted conclusion.

I. Prima Facie Case.

It was factually impossible for the plaintiff here to establish a prima facie case in the first place. The key to understanding this argument lies not so much in formal legal precedent as

in the fundamental dictionary definition of the word "discrimination": to make a choice between two or more options. Before one can discriminate, there must be at least two items from which to make a choice. This Court said in *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971), that "Discriminatory *preference* for any group, minority or majority, is precisely and only what congress has proscribed." (emphasis added). Thus under *Griggs* before one can even reach the question of whether a particular selection device has a disparate impact on a protected group, it must be shown that there were two groups from which the device could *prefer* one over the other. In the present case then, with an all female applicant pool, it was impossible to make a choice between males and females. And, since the height requirement could not possibly operate to prefer men over women, it cannot be said to have a "disparate impact" on women. The discrimination, or preferential choice, made here was based solely on height and not on any protected category (race, religion, sex, etc.).

Another way to show the factual impossibility of Plaintiff's prima facie case is to examine her statistics introduced at trial. Here again the foundation of this argument is to understand the fundamental object of statistics: to provide a meaningful comparison between two or more observations. Plaintiff showed that 80% of all women were shorter than 5 feet 6 inches and only 20% of men were thus. These statistics are meaningless because, with no men in the relevant applicant pool, any comparison with men proves nothing.

The purpose for which this Court has long condoned the use of statistics in Title VII cases is to discover whether an employer's hiring practices (or a selection device) operate to select one group disproportionately over another. *See Hazelwood School District v. United States*, 433 U.S. 299, 308 n.13 and 14 (1977); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 340 n.20 (1977). In other words,

the rate at which members of one group would be selected at random is compared to the rate at which they are actually selected (or excluded). If the comparison shows a difference above 2 or 3 standard deviations, then disparate impact can be inferred.

Applying this principle to our case, then, even if 100% of all men were taller (*or shorter*) than 5 feet 6 inches, it would still have no effect on the chance of any woman in the applicant pool being selected or excluded. *They operate independent of each other: 80% of all women would still be ineligible.* Since the male height statistics have no effect on the female selection rate, they provide no meaningful comparison upon which a fact finder could have found that women were excluded in excess of the rate at which they would have been excluded at random. This is because the statistics for women were only meaningful to predict their selection rate *among themselves.* For example, if 100% of women were shorter than 5 feet 6 inches, none of them could be selected at random; and if 100% of women were taller than 5 feet 6 inches, all of them could be selected at random. The mens' height statistics have no effect on these mathematical realities. Only when men and women are placed in the same applicant pool together can these statistics predict the rate at which the height requirement will exclude women on the basis of their *sex.* Without men in the pool, the statistics can only predict the rate at which women are excluded on the basis of their *height.* Thus, Plaintiff's statistics were meaningless to show that the 5 foot 6 inch height requirement had a disparate impact upon women.[1]

[1] The case law in Title VII cases bears this fact out. In fact, in the paramount statistical proof of discrimination case, *Hazelwood School District v. United States*, 433 U.S. 299 (1977), the Court explained at length that the choice of the relevant comparative statistic would mean the difference of a finding of racial discrimination or not. 433 U.S. 311, n.17. In fact, in *Hazelwood* it was not sufficient to simply compare black teachers hired with the ratio of black teachers available in the geographical area, it was necessary to bet-

Nothing in this Court's opinion in *Connecticut v. Teal*, ___ U.S. ___, 102 S. Ct. 2525 (1982), changes this result. The teaching of *Teal* is really not new. In 1971 the Court, in *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (per curiam), held that a rule barring women with pre-school aged children from employment had a disparate impact on women where men with pre-school aged children were not likewise rejected. This was so even though 75% to 80% of those ultimately hired were women. The reason given is that a greater percentage of women were foreclosed from the *opportunity* of employment than were men. The fact that women, as a class, were ultimately benefitted did not repair the damage done to those women who were initially denied the opportunity, and thus was no defense to their prima facie case.

Similarly, in *Teal* there was a selection device (a test) which preferentially selected whites. In the long run, however, blacks were ultimately promoted more favorably than whites. Again this Court said that the "bottom line" result does not cure the denial of opportunity to those blacks who failed.

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ter qualify that second statistic to define the precise geographical locality the school district could actually draw from.

The need to qualify the second comparative statistic cannot be understated. It has been the death knell to many cases attempting to prove a prima facie case of disparate impact by the use of statistics. *Coe v. Yellow Freight System*, 646 F.2d 407 (10th Cir. 1981) (plaintiff failed to establish a prima facie case when he attempted to introduce two sets of inappropriate statistics comparing irrelevant relationships). *See also DeMedina v. Reinhardt*, 686 F.2d 997 (D.C. Cir. 1982) (relevant applicant pool must be qualified by including only applicants with skills likely to apply); *Payne v. Travenol Labs*, 673 F.2d 798 (5th Cir. 1982) (relevant comparison was applicants with their own transportation); *Rivera v. City of Wichita Falls*, 665 F.2d 531 (5th Cir. 1982) (relevant comparison pool was those with requisite skills); *Williams v. Owens-Illinois, Inc.*, 665 F.2d 918 (9th Cir. 1982) (relevant applicant pool must reside within the geographical area found to be the actual source of applications); *Pope v. City of Hickory*, 29 FEP Cas. 399 (D. N.C. 1981) *aff'd* 679 F.2d 20 (4th Cir. 1982) (comparative pool not meaningful because of small size and uncertainty); *United States v. County of Fairfax*, 629 F.2d 932 (4th Cir. 1980) (geographical area must be qualified); *Wilmore v. City of Wilmington*, 533 F. Supp. 844 (D. Del. 1982) (comparative pool must be qualified with special employment skills).

The critical distinction between those cases and the case at bar is this: in *Phillips* and *Teal* there was a selection device that caused one group to be preferred over another on the basis of race or sex, *and then* some other factor was offered to repair the damage done by the disparate impact. In the instant case, however, there were not two protected groups between which a preference could be made. Men were not preferred over women; only tall women were preferred over short women. There were no women who were initially denied the employment opportunity *on the basis of their sex.* The fact that women were ultimately hired is not a factor subsequently offered to cure the effect of any disparate impact because there was none. The "bottom line" result here (that women were eventually hired) was a foregone conclusion given the fact that being female was a prerequisite to entering the applicant pool.[2] It was not something interposed later down the line in the hiring process to change the result.

II. Back Pay.

This Court has layed down several ground rules concerning the awarding of back pay. In *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975) the Court said that retroactive relief should be applied consonant with the twin statutory objectives of Title VII: eradicating discrimination throughout the economy and making whole the victims. The Court established that back pay should be denied only for reasons which, if applied generally, would not frustrate these central goals. Later, in *City of Los Angeles Department of Water and Power v. Manhart*, 435 U.S. 719 (1978), the Court said that *Albemarle* does not mandate the automatic awarding of back pay, although noting that the presumption of back pay can seldom be overcome. In *Manhart* female employees were required to contribute more to the pension fund than men because of the fact that they live longer. The Court labeled as "equitable"

[2] Although it is not a crucial issue in this case, it may fairly be said that being female was a bona fide occupational qualification. Viewing it thus further points out the factual impossibility of plaintiff's prima facie case.

the nature of the back pay remedy and in that case concluded retroactive relief was in error for two reasons. First, reasonable and intelligent pension administrators, without the benefit of extensive briefs and arguments, could well have assumed their actions were legal. Second, the potentially devastating impact of a back pay award on a pension fund could not be ignored. Finally, in *Ford Motor Co. v. EEOC*, ___ U.S. ___, 102 S. Ct. 3057 (1982), the Court indicated that the larger objectives of Title VII should govern retroactive relief and the best way to achieve this goal is to promote voluntary compliance. Back pay and other retroactive remedies should be used as an incentive to motivate employers to put potential Title VII claimants to work.

Viewing all these principles together it is clear that this was not a proper case for back pay. It is doubtless that reasonable and intelligent men could differ over the legality of the city's application of the height requirement here because, in fact, the same panel of three federal appellate judges have twice decided the issue differently. The city adopted the height requirement from a state statute authorizing it in July 1973 and eliminated it in November 1974, before suit was even filed in this case. The City should have had the right to presume the validity of the state statute, at least where it was not facially discriminatory, and especially in light of the fact that *Dothard v. Rawlinson*, 433 U.S. 321 (1977), was not decided until three years later. The city eliminated the height requirement of its own accord. And, let us not overlook this fact: the city got itself into this mess only because it was attempting to further an affirmative action goal. The trial judge specifically found lacking any discriminatory purpose. The Massachusetts Commission Against Discrimination lauded the effort of the City to recruit female police officers and gave its special permission to hire a woman exclusively. If the back pay award in *Manhart* would have had devastating effects on pension plans, the back pay award here will surely set voluntary affirmative action efforts back to pre-1964 levels.

This is not a case where, as in *Ford*, back pay will motivate an employer. The employer was motivated to begin with. This is a case where back pay will purely punish the employer for voluntarily undertaking to further Title VII's goals.

Conclusion.

The questions presented in this petition have far reaching consequences. The prima facie case standard has not only been obscured, but a simple, fundamental principle has been buried beneath a quagmire of goals and objectives. A "certain generality" has been ascribed to this Court's opinions such that the definition of discrimination has been lost. The decision of the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision and is in conflict with a decision of the Court of Appeals for the Fifth Circuit.

An employer, contemplating the affirmative hiring of one protected group would not only be confused but fearful to make such a decision with the risk of back pay looming so large.

The petition presents issues of substantial importance and the time is ripe for review. For all these foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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On the Petition,
Michael J. Tremblay.
February, 1983

United States Court of Appeals
For the First Circuit

No. 81-1361.

LYNDA LeBOEUF COSTA,
PLAINTIFF, APPELLEE,

v.

JOHN A. MARKEY, et al.,
DEFENDANTS, APPELLANTS.

JUDGMENT

Entered December 3, 1982.

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:

Dana H. Gallup, *Clerk.*

By: _____
Francis P. Scigliano,
Chief Deputy Clerk.

[cc. Messrs. Fernandez, McKenna & Barnico.]

United States Court of Appeals
For the First Circuit

No. 81-1361.

LYNDA LeBOEUF COSTA,
PLAINTIFF, APPELLEE,
v.
JOHN A. MARKEY, et al.,
DEFENDANTS, APPELLANTS.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. ROBERT E. KEETON, *U.S. District Judge.*]

Before
COFFIN, *Chief Judge,*
CAMPBELL and BOWNES, *Circuit Judges.*

Armand Fernandes, Jr., for appellants.
Thomas F. McKenna, with whom *Mariann Zampano* was on brief, for appellee Lynda LeBoeuf Costa.
Francis X. Bellotti, Attorney General, *Betty E. Waxman*, Assistant Attorney General, Government Bureau, and *Thomas A. Barnico*, Assistant Attorney General, Government Bureau, on brief, for state appellee.

December 3, 1982

BOWNES, *Circuit Judge.* We granted the plaintiff's petition for a rehearing to examine the effect on this case of the Supreme Court's decision in *Connecticut* v. *Teal*, 50 U.S.L.W. (U.S. June 21, 1982). Because we find that *Teal* mandates a reversal of our prior opinion, we restate the relevant facts.

The New Bedford Police Department makes appointments for police officers from a list of eligible applicants that is cer-

tified to it by the state civil service personnel division. The lists at issue in this case were derived from a 1972 written examination for the position of police officer. Applicants' names appear on the list in order of their scores on the exam, adjusted for various statutory and court-ordered preferences. Plaintiff took the 1972 examination and was notified in 1973 that her score was 93.3 percent. She passed the city's physical fitness examination in May 1974.

Prior to February 1974 New Bedford had two distinct police categories: males were police officers and females were police women. Male applicants were ineligible for positions as police officers if they failed to meet a minimum height requirement of five feet six inches. In February 1974 the city abandoned these separate categories, and thereafter both men and women competed for positions as police officers. Women applicants were also required to meet the five feet six-inch height minimum.

In March 1974 a woman police officer retired. Because the city needed a female officer to perform special duties, related, for example, to female prisoners, it sought special permission from state authorities to engage in sex-specific hiring using a list of female applicants already certified for Taunton, Massachusetts. The Massachusetts Commission Against Discrimination authorized New Bedford's use of the Taunton list, but the state Division of Civil Service never certified the list to New Bedford.

The Division of Civil Service supplied New Bedford with an integrated list of male and female applicants on July 30, 1974, that was derived from the 1972 examination. Plaintiff's name was mistakenly omitted from this list, but was included on August 7, 1974, after the city was notified of the error. Her name, however, was incorrectly placed higher on the list than it should have been.[1] This error was corrected, but not

[1] Plaintiff's position on the list was based on the ranking of an applicant who not only had scored 93.3 percent on the examination, as plaintiff had, but also was a member of a racial minority to be accorded preference, which plaintiff was not.

until February 1975, well after the allegedly discriminatory acts occurred.

In August 1974 plaintiff was interviewed for a position as a police officer in New Bedford, but was rejected because she failed to meet the five feet six-inch height requirement. If her name had appeared in the correct place on the July 30 list, she would not have received the interview. Thus, application of the height requirement prevented plaintiff from obtaining a job as a police officer for which she was not eligible under the civil service requirements.

After an additional female police officer retired and use of the July 30 list did not result in the hiring of any women, New Bedford sought and received approval to hire from a list dated August 12, 1974. This list was derived from the July 30 list, but contained only the names of the female applicants. Plaintiff's name correctly appeared first on this list. Plaintiff, however, was again rejected because she failed to meet the height requirement. Two women who placed third and fourth on the list satisfied the height requirement and were appointed to positions as police officers. The woman appearing second on the list was also disqualified because of the height requirement.

Plaintiff brought suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, using a disparate impact theory of discrimination. Plaintiff alleged that New Bedford's use of the height requirement discriminated against her on two separate occasions: once, when the integrated list was used, and again, when the female-only list was used. We start with the integrated list. Plaintiff produced undisputed evidence that eighty percent of the male population is at least five feet six inches tall, while less than twenty percent of the female population reaches this height. The city defended on the basis of the incorrect placement of plaintiff's name on the applicant list for police officers. The

district court held that, although plaintiff was deprived only of an "invalid appointment" as a police officer, the defendants nonetheless had violated Title VII. The court denied plaintiff back pay, but issued a declaratory judgment in her favor. Neither party appealed this judgment.

As to the female-only list, the district court held that the second application of the height requirement also violated plaintiff's rights under Title VII and entitled her to back pay and other relief. The defendants appealed, and we reversed.

In our decision we concluded that because the height requirement was applied to women only there could be no disparate effect on women and hence no prima facie case of disparate impact discrimination. In so doing we rejected plaintiff's argument, which relied primarily on the Second Circuit's opinion in *Teal* v. *Connecticut*, 645 F.2d 133 (2d Cir. 1981), *aff'd*, 50 U.S.L.W. 4716 (U.S. June 21, 1982), that the height requirement was one component of a selection process that excluded eighty percent of all women applicants and that this alone violated Title VII even though the overall result of the selection process was not objectionable. We explicitly declined to follow the Second Circuit's approach in *Teal*, and the Supreme Court's subsequent affirmance of *Teal* made this reconsideration necessary.

In *Connecticut* v. *Teal*, 50 U.S.L.W. 4716 (U.S. June 21, 1982), the Supreme Court considered "whether an employer sued for a violation of Title VII of the Civil Rights Act of 1964 may assert a 'bottom line' theory of defense." *Id.* at 4716. Under such a theory, an employer using an employment criterion that has an adverse impact on a group protected by Title VII can defend on the ground that the adverse impact is offset by other measures and the final result is an appropriately balanced work force. The Court held "that the 'bottom line' does not preclude [a plaintiff] from establishing a prima facie case, nor does it provide [an employer] with a defense to such a case." *Id.* at 4717.

In *Teal*, the plaintiffs, four black employees of the Department of Income Maintenance of Connecticut, sought to upgrade their positions from provisional to permanent Welfare Eligibility Supervisors. The first step in the promotion process was attainment of a passing score on a written examination. Failure of this test precluded an applicant from further consideration for promotion. Passing the test meant that the applicant moved on to later stages of the selection process in which the employer considered various other criteria, such as past work performance and recommendations of supervisors. Plaintiffs failed the written exam and brought suit alleging a violation of Title VII.

Plaintiffs produced evidence that the written examination had a significantly disparate effect on black candidates; the black passing rate was sixty-eight percent that of the white. The employer defended on the basis of the bottom line result of its promotion process. It argued that its additional factors in the promotion process, those considered once an applicant passed the written test, resulted in promotion of a greater percentage of black than white candidates.

Rejecting the employer's arguments, the Court explained that in determining whether the plaintiff had established a prima facie case under a disparate impact theory of discrimination the proper focus is not on the "bottom line" results of the hiring process, but rather on the particular step in the process alleged to have a discriminatory effect.

> In considering claims of disparate impact under § 703(a)(2) this Court has consistently focused on employment and promotion requirements that create a discriminatory bar to *opportunities*. This Court has never read § 703(a)(2) as requiring the focus to be placed instead on the overall number of minority or female applicants actually hired or promoted.

Id. at 4719 (emphasis in original). Continuing on to a discus-

sion of its decision in *Dothard* v. *Rawlinson*, 433 U.S. 321 (1977), a case concerning height and weight requirements for prison guards, the Court explained:

> Although we noted in passing that women constituted 36.89 percent of the labor force and only 12.9 percent of correctional counselor positions, our focus was not on the "bottom line." We focused instead on the disparate effect that the minimum height and weight standards had on applicants: classifying far more women than men as ineligible for employment.

50 U.S.L.W. at 4719. The Court concluded that "[t]he suggestion that disparate impact should be measured only at the bottom line ignores the fact that Title VII guarantees these individual respondents the *opportunity* to compete equally with white workers on the basis of job-related criteria." *Id.* (emphasis in original).

Teal teaches that the proper place to evaluate the strength of a Title VII plaintiff's prima facie case of disparate impact discrimination is the point at which the employer's neutral criterion has a discriminatory effect. The Court's focus must be on the first step in the employment process that produces an adverse impact on a group protected by Title VII, not the end result of the employment process as a whole. When it is shown that an employer's rule disproportionately affects members of a class protected by Title VII, eliminating them from competition for an employment opportunity, the plaintiff establishes a prima facie case, and the burden shifts to the employer to show job-relatedness. The employer cannot point to the results of its process, but must justify use of the discriminatory element in that process.

Our original decision focused on the end result of New Bedford's hiring process. We reasoned that the height requirement could not have a discriminatory effect on women because the city, during this phase of its police officer recruit-

ment, hired only women. We explained that "[a]bsent any discriminatory purpose, we see no justification for looking behind a result that does not reveal a hiring that has a disproportionately adverse impact on the relevant minority labor pool." *Costa* v. *Markey*, 677 F.2d 158, 161-62 (1st Cir. 1982). *Teal* requires us, however, to look behind the result and evaluate the disparate impact of the height requirement itself, not the end result of its application in this particular case.

In the typical disparate impact case, two groups, one protected by Title VII and one not, are competing for employment opportunities. The employer applies a facially neutral rule to both groups, but the adverse results of the rule fall disproportionately on the group protected by Title VII. The sticking point here is that in this instance of the city's application of its height requirement women were excluded only relative to other women. While this may be used as a way to distinguish this case from *Teal*, we think to do so would evade *Teal*'s specific rejection of the "bottom line" defense.

Were we to focus in this case on the city's hiring of only women, we would be focusing on the "bottom line." It is undisputed that New Bedford's five feet six-inch height requirement resulted in far more women than men being classified as ineligible for appointment as police officers. The city routinely applied the height requirement to both male and female applicants. In this case the city applied the requirement to women only and hired only women. But this is no defense to a prima facie case of disparate impact discrimination. It seeks to justify the disparate effect of the rule in general by pointing to the end results of one particular application of the rule. This is the "bottom line" approach which is proscribed by *Teal*. In light of *Teal*, we hold that when, as here, an employer uniformly applies a rule to male and female applicants and applies it in one round of hiring decisions to a

pool of only female applicants, the rule must be job-related if in its regular application it has a disparate effect on women.

We realize that an argument can be made that *Teal* does not apply to a sex-specific list where men and women are not in competition for the same job because a plaintiff cannot establish a prima facie case if the result of the particular application of the employer's neutral rule only generates statistics about how women fared as compared to other women. Such an argument, however, overlooks the proper focus for examining the existence of a prima facie case. The Supreme Court has never required a plaintiff to use statistics from the actual application of a neutral rule when establishing a prima facie case.

> There is no requirement . . . that a statistical showing of disproportionate impact must always be based on analysis of the characteristics of actual applicants. . . . [R]eliance on general population demographic data [is] not misplaced where there [is] no reason to suppose that physical height and weight characteristics of [one state's] men and women differ markedly from those of the national population.

Dothard v. *Rawlinson*, 433 U.S. 321, 330 (1977) (citations omitted). If there is reason to doubt the accuracy with which national statistics reflect the effect of the rule on the particular employer's labor pool, more narrowly tailored statistics may be required. *See New York City Transit Authority* v. *Beazer*, 440 U.S. 568, 586 n.29 (1979). A case involving a height standard does not require resort to these more exacting statistics.

We hold that plaintiff has established a prima facie case of disparate impact discrimination by making an undisputed showing that New Bedford's use of its height requirement excluded far more women than men from competing for positions as police officers. Since the city did not seek to justify

its requirement by proving job-relatedness,[2] plaintiff has proven a complete violation of Title VII.

The final issue is relief. The parties have stipulated to the amount of back pay, interest, and attorney's fees and the seniority and wage level to which the plaintiff would be entitled if she prevails. The city defendants,[3] however, dispute whether plaintiff is entitled to back pay at all, the time from which back pay is to be computed, and if she is entitled to back pay, they argue that the state should be jointly liable for any award.

The defendants recognize and we agree that once a violation of title VII is proven, the successful plaintiff is presumptively entitled to back pay. *See City of Los Angeles Department of Water & Power* v. *Manhart*, 435 U.S. 702, 719 (1978); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 421 (1975). "The *Albemarle* presumption in favor of retroactive liability can seldom be overcome, but it does not make meaningless the district courts' duty to determine that such relief is appropriate." *City of Los Angeles Department of Water & Power* v. *Manhart*, 435 U.S. at 719. In particular, the district court is required to exercise its discretion in accord with the purposes of title VII. "[B]ackpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." *Albemarle Paper Co.* v. *Moody*, 422 U.S. at 421 (footnote omitted). The defendants claim that in this case two special circumstances exist to justify denial of a back pay award without frustrating the central purposes of title VII.

The first is reliance on a state statute. Defendants rely on a

[2] The height requirement rule has been eliminated.

[3] All further references to defendants are to the city defendants, the city officials of New Bedford. The state is also a party defendant.

line of cases, decided before *Albemarle*, in which the courts ruled that an employer's compliance with a state law designed to protect women, although a violation of title VII, was an important factor in determining whether the plaintiff was entitled to back pay. *See, e.g., Williams* v. *General Foods Corp.*, 492 F.2d 399, 407 (7th Cir. 1974); *Ash* v. *Hobart Manufacturing Co.*, 483 F.2d 289, 292-93 (6th Cir. 1973); *Kober* v. *Westinghouse*, 480 F.2d 240, 246-49 (3d Cir. 1973). The Supreme Court in *Albemarle* did not reach the question of whether reliance on female protective statutes provides an employer with a shield from back pay liability, *Albemarle Paper Co.* v. *Moody*, 422 U.S. at 423 n.18, and although at least two circuit courts since *Albemarle* have stated that such reliance would be a factor in the equitable balancing at the remedy stage, *see Palmer* v. *General Mills*, 600 F.2d 595, 598-99 (6th Cir. 1979) (dictum); *Stewart* v. *General Motors Corp.*, 542 F.2d 445, 451 (7th Cir. 1976) (dictum), *cert. denied*, 433 U.S. 919 (1977); *contra Stryker* v. *Register Publishing Co.*, 423 F. Supp. 476, 477 (D. Conn. 1976), we need not decide this question in the present case.

In the line of cases to which defendants look for support, the state statutes in question unequivocally commanded the employer to treat women employees differently than male employees. Such a statute, for example, would place limits on the hours a woman could work or on the strenuousness of the tasks she could perform. In the typical case the employer was caught between the proverbial rock and a hard place. That is, it could comply with either the commands of title VII or the state statute, but not both. The courts reasoned that the employer should not be penalized with a back pay award when it relied in good faith on a valid state statute.

In this case, there is no statute that commanded New Bedford to adopt the height requirement. The statute to which defendants point only authorizes a city or town to adopt a

height requirement if it chooses to do so. *See* 1973 Mass. Acts ch. 351. The statute did not present New Bedford with the dilemma inherent in cases in which the state statute irreconcilably conflicts with title VII; such a conflict is the factor that tips the equitable balance in a defendant's favor.

The second special circumstance that defendants claim requires the court to deny back pay is their own good faith. We think that *Albemarle* prohibits a court from denying back pay solely on the basis of the employer's good faith. Although in *Albemarle* the Court ruled only that an employer's lack of bad faith is not a sufficient reason for denying back pay, 422 U.S. at 422, the factors the defendants used to show absence of bad faith are almost identical to those asserted here, and the Court's reasoning, therefore, is equally applicable here.

In *Albemarle* defendant's claim of no bad faith was based on its attempts to recruit minorities and its lack of knowledge that its seniority system violated title VII despite its disparate effect on blacks. Here, defendants contend that their good faith is demonstrated by their taking affirmative firm steps to hire women and their lack of intent to discriminate. Defendants, thus, in effect ask us to deviate from the holding that *Albemarle* compels.

We are not convinced that denial of back pay would not frustrate the purposes of title VII. Denying back pay on the basis of an employer's innocent intentions would make the remedy "a punishment for moral turpitude, rather than a compensation for workers' injuries. This would read the 'make whole' purpose right out of Title VII . . . ." *Albemarle Paper Co.* v. *Moody*, 422 U.S. at 422. Moreover, too close an "emphasis on the employer's aspirations and intentions accords too little weight to the legal standards that govern under Title VII. The Act focuses on effects, not purposes." *Cohen* v. *West Haven Board of Police Commissioners*, 638 F.2d 496, 504 (2d Cir. 1980). Were we to deny back pay here we would eliminate an

important incentive for employers to undertake self-examination of their employment practices and discard those that have an illegal discriminatory effect.

Defendants next claim that their back pay liability was cut off as of the date of their subsequent offer to place plaintiff on the police force if she met the applicable civil service regulations. Plaintiff argues, first, that any offer was not "bona fide" because it was necessarily conditioned on plaintiff's obtaining a place on a civil service list, a factor the city could not control, and second, that she was not obligated to accept the offer because it did not include back pay and retroactive seniority. The Supreme Court's recent decision in *Ford Motor Co.* v. *EEOC*, 50 U.S.L.W. 4937 (U.S. June 28, 1982), controls our disposition of this issue.

In *Ford Motor Co.* the Court held that "absent special circumstances, the rejection of an employer's unconditional job offer ends the accrual of potential backpay liability," *id.* at 4943, and that an employer's failure to include in the offer retroactive seniority or back pay does not make the offer unconditional and is not a special circumstance justifying rejection. *Id.* at 4938 n.7, 4940-43. From our examination of the record we are unable to discern the exact date on which the city made an offer to plaintiff and whether the offer was unconditional as defined in *Ford Motor Co.* We must therefore remand to the district court so that it can determine the amount of back pay due in the light of *Ford Motor Co.*

Finally, we uphold the district court's limitation of the back pay award to the city defendants only. The single act of discrimination that led to an award of back pay was the application of the height requirement to plaintiff during competition involving the all-women list. As we noted earlier, the city's adoption of the height requirement was completely voluntary. Although the state *permitted* an individual city to adopt a height requirement, it in no way compelled New Bed-

ford to do so, and it clearly did not mandate adoption of a requirement that violated title VII. In short, neither the plaintiff nor the city produced any evidence that the state was responsible for the discrimination at issue.

Our prior opinion finding no liability is reversed, and the case is remanded for further proceedings consistent herewith.

CAMPBELL, *Circuit Judge* (Concurring). I concur in the analysis of the court. While Chief Judge Coffin points out certain differences between *Teal* and this case, and while my personal views remain in accord with our original *Costa* opinion (and with Justice Powell's dissent in *Teal*), I am not persuaded that *Teal* is distinguishable. When the Supreme Court decides a case, I think we must ascribe a certain generality to its opinion; the present issue seems to me to be subsumed in principle, if not in every respect, by the language and holding in *Teal*. Accordingly I think we must affirm the district court.

COFFIN, Chief Judge (dissenting). This case seems to me unlike most cases resulting in a divided panel. Instead of a head-on clash of arguments (there is/is not probable cause, sufficient evidence, due process, etc.), the difference between my brothers and me lies in our choice of a starting point. I insist that, because there has been no discrimination against women in the process of filling the positions at issue here, there is no prima facie case to begin with. My brothers' position has to be that although women have not been discriminated against, the use of a criterion of choice — height — which in *other* circumstances *can* be a means of discriminating against women, is sufficient to make out a prima facie case here. Because this seems to me to provide a remedy when there has been no wrong and to carry abstract disparate impact analysis far beyond that articulated in *Connecticut* v. *Teal*, ___ U.S. ___, 102 S. Ct. 2525, 50 U.S.L.W. 4716 (U.S. June 21, 1982), I dissent.

At the outset, I must assume some responsibility for what I consider to be current confusion as to the relationship between the situation in this case and that in *Connecticut* v. *Teal*. In our first opinion, *(Costa I)*, I described *Teal* as the "mirror image" of this case and specifically declined to follow the *Teal* approach. In part because of that language I agreed that in light of the Supreme Court's affirmance of *Teal* we should rehear this case and make sure that the two cases differ significantly. I think they do.

The plaintiff in this case had urged us to accept the Second Circuit's opinion in *Teal* as guidance for our resolution of her claim. We could (and perhaps should) have dismissed *Teal* as simply irrelevant to a situation where the challenged barrier never had any disproportionate effect on women. Instead, we described the cases as "mirror images", a description which has caused no small amount of confusion and which I feel some obligation to attempt to clarify. In describing *Teal* as the mirror image of this case, I meant to highlight the differences rather than the similarities between the two cases. Both cases involved a pass-fail hiring barrier that statistics demonstrated had a greater impact on members of the protected class than on non-members. Both also involved an additional aspect of the hiring process that operated to remove the impact of that barrier. But there the similarity ends. They are mirror images and not identical situations because the aspects of the process that operated to remove the overall impact of the barrier were at different ends of the process. In *Costa* there was no discrimination to begin with; in *Teal* the initial discrimination was compensated for at the end. That timing is a crucial distinction between the two cases because, as we pointed out in *Costa I*, the initial decision in this case to hire only women meant that the pass-fail barrier never had any disparate effect on women. There was, therefore, no question of remedying the discriminatory effect of an element in a

process with a non-discriminatory bottom line. There was never any discriminatory effect.[1]

As I understand the debate between the majority and the dissent in *Teal*, the issue was whether an employer should be excused for utilizing a barrier that statistics showed disproportionately affected blacks as long as it added enough blacks at the end of the hiring process to meet the appropriate racial ratio. The majority concluded that a non-discriminatory "bottom line" was no justification for discriminating against individuals along the way. They found it "clear that Congress never intended to give an employer license to discriminate against some employees on the basis of race or sex merely because he favorably treats other members of the employees' group." 50 U.S.L.W. at 4720. In Justice Powell's view, the result reached by the majority is an unprecedented expansion of the theory of disparate impact. As he points out, Title VII plaintiffs have been allowed to proceed under either a theory of disparate treatment — by establishing that they, as individuals, have been discriminated against — or of disparate impact — by establishing that they have been victims of a facially neutral practice that excludes a disproportionate number of members of his protected group. Because the latter theory necessarily requires reference to the group rather than to the individual, Justice Powell would not allow a plaintiff proceeding under this theory to "have it both ways", to

[1] In *Costa I*, we also described *Teal* as standing for an approach to reviewing disparate impact discrimination claims that we rejected. In a position similar to that of Justice Powell, dissenting in *Teal*, we concluded that if the overall effect of a hiring process is not discriminatory, we saw no reason to look behind that result to possibly discriminatory elements of the process. We no longer have the liberty of offering that broad justification for our result in this case, but we can still point out that *Teal* and this case are different in the crucial respect that the challenged hiring barrier in one had a disparate effect on women and that in the other did not. Nothing in *Teal* requires us to find a discriminatory effect where there is none.

infer discrimination by reference to the group and then ignore the fact that the group as a whole has not been injured. In his view, this is "to confuse the individualistic aim of Title VII with the methods of proof by which Title VII rights may be vindicated." *Id.* at 4721 (Powell, J., dissenting).

Whatever the merits of the dispute in *Teal*, neither side addressed the issue raised by plaintiff here. My brothers, I submit, have made a leap beyond the position taken by the majority and criticized by the dissent in *Teal*. For, as far as I can tell, the Supreme Court has never held, or even intimated, that a Title VII plaintiff should be able to recover for discrimination on the basis of her sex when it is impossible that she was disadvantaged in relation to any man. We held in *Costa I*, and my brothers still agree, that at the only point in time when the height requirement had any effect on plaintiff, she was in competition only with other women for a job as a police officer.[2] As we pointed out in *Costa I*, courts that have addressed similar situations agree that when there is no competition between the sexes, there can be no discrimination on the basis of sex. *See Stroud* v. *Delta Air Lines, Inc.*, 544 F.2d 892 (5th Cir. 1977); *Gerdom* v. *Continental Airlines, Inc.*, 648 F.2d 1223 (9th Cir. 1981).

The majority reasons that "[w]ere we to focus in this case on the city's hiring of only women, we would be focusing on the 'bottom line' ", a focus forbidden by *Teal*. To the contrary, I submit that in this case, the city's hiring of only women is the introductory paragraph. It is the key to

[2] It has not been argued and there is no evidence that the relative numbers of men and women hired would have varied according to the number or quality of the eligible women applicants. The City requested permission to hire from a list of women because of its need for female police officers and the fact that, wholly apart from the height requirement, there were no women high enough on the integrated list to be hired. Thus it is doubtful that after the lists were separated the number of women hired would have increased had there been no height requirement.

everything else that follows. According to *Teal*, once a disparate effect is demonstrated, no amount of undoing of that effect will suffice. In this case, there is no effect, so we need not worry about the employer's "bottom line".

My dispute with my brothers, I believe, comes down to what is required for a plaintiff to demonstrate disparate impact. I have no question that in another context, where the sexes are in competition, the statistics provided here, showing that as of 1971-74 the average height of women between the ages of 25 and 34 was 5 feet, 4.1 inches while that for men in the same age bracket was 5 feet, 9.6 inches, would establish a prima facie case of disparate impact and require an employer to demonstrate that his height requirement was job related. My point in *Costa I* and the point which I reiterate here is that the fact that a hiring barrier excludes more women than men is irrelevant when the women cannot lose out to men. When only women are competing for a job as a police officer, a height requirement may be unfair but it is not a violation of Title VII.

United States Court of Appeals
For the First Circuit

No. 81-1361.

LYNDA LeBOEUF COSTA,

PLAINTIFF-APPELLEE,

v.

JOHN A. MARKEY, et al.,

DEFENDANTS-APPELLANTS.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[HON. ROBERT E. KEETON, *U.S. District Judge.*]

Before

COFFIN, *Chief Judge,*

CAMPBELL and BOWNES, *Circuit Judges.*

Armand Fernandes, Jr., for appellants.

Thomas F. McKenna, with whom *Mariann Zampano* was on brief for appellee.

Thomas A. Barnico, Assistant Attorney General, Government Bureau, Department of the Attorney General, with whom *Francis X. Bellotti*, Attorney General, and *Betty E. Waxman*, Assistant Attorney General, Government Bureau, Department of the Attorney General, were on brief, for the State appellee.

May 3, 1982

COFFIN, *Chief Judge.* The interesting question at the heart of this appeal is whether the authorities of New Bedford engaged in sex discrimination when they hired police officers from an all-women pool from which the female plaintiff was excluded because she was below the required minimum height of 5 feet, 6 inches.

Plaintiff's action was brought against the mayor, chief of police, and city councillors of New Bedford and the personnel

administrator and Civil Service Commission of the Commonwealth of Massachusetts. The district court denied relief sought under 42 U.S.C. §§ 1981, 1983, and the Equal Protection clause of the Fourteenth Amendment, but granted retroactive relief in the form of back pay and other benefits for the city's violation of section 703(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2. The city challenges both the finding of discrimination and the conclusion that the Commonwealth defendants were not jointly and/or severally liable with the city defendants.[1]

The presently critical facts are few. In 1974 New Bedford abolished its separate hiring procedures for "policewomen" and "police officer" and used an "integrated" candidate list for "police officer" prepared by state civil service. Early in that year, a recently adopted 5 feet, 6 inches height requirement was extended to apply to women as well as to men. Plaintiff, 33 years old and 5 feet, 3 inches tall, took her police civil service examination in 1972, was notified in 1973 that her score was 93.3 per cent, and in May, 1974, passed the city's physical fitness examination. On July 30, 1974, the use of an integrated list of men and women, ranked by civil service to reflect examination scores and statutory and court ordered preferences, failed to result in the appointment of any female.[2]

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[1] The plaintiff presently serves on the police force with seniority and pay calculated in accordance with the district court's finding that she had been improperly deprived of employment at the time of the hiring from the height-restrictive all-women pool. In the event this court finds no violation of Title VII, plaintiff is to retain her position but her pay and seniority are to be calculated on the basis of the date of her actual appointment.

[2] This end result followed a drama, if not a comedy, of errors in which, first, plaintiff's name was erroneously left off the list, second, her name was restored to the list at an erroneously higher position than her various qualifications merited, and, third, after an interview (which she should not have had) she was rejected because of failure to meet the height requirement. The district court's ruling that this rejection did not cause cognizable harm because any appointment of plaintiff would have been invalid, is not contested.

New Bedford, having a continuing need for a female police officer, *e.g.*, to attend to female prisoners and to investigate cases involving females, sought and received permission from the Massachusetts Commission Against Discrimination to make a gender-specific hiring. To implement this action, it also received, on August 12, an all-women list. Plaintiff, although placing first on the list, was rejected because of her height. All height requirements were abolished in November, 1974. The evidence before the court, in addition to these facts, included national statistics showing that as of 1960-1962 80 per cent of women between 18 and 34 were shorter than 5 feet, 6 inches, and that as of 1971-1974 the average height of women between the ages of 25 and 34 was 5 feet, 4.1 inches while that for men in the same age bracket was 5 feet, 9.6 inches.

The district court specifically found that the height requirement had not been adopted "because of" a purpose to discriminate against women. It therefore addressed the Title VII issue as one involving a presumptively neutral test which results in a disparate impact, without requiring proof of a discriminatory purpose. *Albemarle Paper Co.* v. *Moody*, 442 U.S. 405, 425 (1975). The court found that plaintiff's statistics established "the significantly disparate impact of a 5 feet 6 inches minimum height requirement upon women as compared to men." This, so the court concluded, made out plaintiff's prima facie case which was unrebutted. The court therefore found the height requirement invalid because it was "so intimately and integrally related to the broader use of the height requirement" and because "but for application of the height requirement to the selection from the all-women list, plaintiff would have been on the police force under a valid appointment."

The precise issue before us is whether the district court was correct in concluding that plaintiff had established a prima

facie case under the statute. The statute, 42 U.S.C. § 2000e-2(a), states, in essence, that it is an unlawful practice for an employer "(1) to . . . refuse to hire . . . any individual . . . because of such individual's . . . sex . . .; or (2) to . . . classify . . . applicants for employment in any way which would deprive . . . any individual of employment opportunities . . . because of such individual's . . . sex . . . ." A prima facie disparate impact case under the statute requires a demonstration by plaintiff that the employee selection restriction selects "applicants for hire . . . in a [sexual] pattern significantly different from that of the pool of applicants." *Albemarle Paper Co.* v. *Moody, supra*, 442 U.S. at 425.

Defendants argue in essence that plaintiff was excluded, not because she is a woman but because she is short. The criterion of height, of course, does operate to exclude more women than men when the two sexes are in competition. It is then a built-in trigger of discrimination. But, they contend, the fact that the pool of applicants is limited to women operates as a safety lock, preventing the trigger from achieving its ordinarily discriminatory end result. The end result here, the filling of the two available job openings from the August 12 list with women only, cannot be said to produce a sexual pattern significantly less representative of women than is the pool of persons interested in joining the New Bedford police force. Thus, say defendants, plaintiff has not established a prima facie case. Plaintiff finds this analysis simplistic. She emphasizes the fact that she, an individual woman, never had a chance to compete because of a pass-fail threshold height requirement that is more adverse in its impact on women than it is on men.

In assessing these positions, we think that an analogy may point up the issue more sharply. If a private employer maintained a branch drug store which he wished to man with all-black personnel and if he, quixotically, wished all his person-

nel to be college graduates, could it be successfully argued that he violates Title VII by carrying out his plan? The college graduate requirement, if applicable where whites and blacks are in competition, would bear much more harshly on blacks, but not where only blacks are to be hired. In both cases there are several layers of analysis. On the surface each applicant is excluded from a job opportunity because of a neutral factor — height or education. To this the short female and non-college black person respond that each supposedly neutral factor actually is an indicium of their minority, since it in fact usually operates to prefer males or whites. But when we probe one layer deeper, we conclude that this is an inadequate response. The height or education factor does its dirty work only when there are males or whites to prefer. Absent this role of disproportionate preferment, the factor no longer distinguishes between sexes or races, but only within the sex or a race. The taint is not inherent in the factor, but contextual. *Alterat contextus, cessat ipsa lex.* In sum, we accept defendants' reasoning.

The relevant case law heavily supports this reasoning. An important line of cases is led by *Stroud* v. *Delta Air Lines Inc.*, 544 F.2d 892 (5th Cir. 1977), which upheld the validity of an airline's no-marriage rule for its all-women group of flight attendants. The court reasoned:

> "Here, plaintiff is not a member of one of the relevant, identifiable classes which has been discountenanced in favor of another such class. Rather, certain women — stewardesses who are unmarried — are favored over certain other women — stewardesses who are married. As one of the all-female group of flight attendants employed by Delta, plaintiff suffered a discrimination, but it was based on marriage and not sex. Men were not favored over women; they simply were not involved in the functioning of the policy." *Id.* 544 F.2d at 893.

See also DeVolld v. *Bailar*, 568 F.2d 1162, 1163-64 (5th Cir. 1978) (promotion of one Mexican-American removes any possibility that the plaintiff can prove that her situation is due to discrimination against her as a Mexican-American).

Plaintiff attempts to distinguish these cases as generally involving discharge standards which did not automatically exclude 80 per cent of the available female applicant pool. This does not seem persuasive to us. Although particular lawsuits involving such rules as no-marriage may have arisen in a discharge context, the rule itself effectively excludes married women from applying.

Plaintiff relies heavily on a case in which the court held that black plaintiffs had made out a prima facie case by showing that one component of a selection process for promotion to Welfare Eligibility Supervisor, a written examination, had a disparate impact on them and operated as a pass-fail barrier to their further consideration, notwithstanding the fact that the total selection process did not have a disparate impact on black candidates. *Teal* v. *Connecticut*, 645 F.2d 133 (2d Cir. 1981) *cert. granted*, 50 U.S.L.W. 3244 (October 6, 1981).[3]

In *Teal* plaintiffs sought to gain permanent status as supervisors. They first had to pass a written examination. From

[3] We note our discomfiture at learning only by our own research, after oral argument in March, 1982, of the granting of certiorari five months earlier. The question presented is:

> "In Title VII action in which final outcome of employee selection process does not result in adverse impact against plaintiffs' minority group, can plaintiffs make prima facie showing of employment discrimination by merely establishing: (1) that they failed to succeed on component of selection process and thereby became ineligible to proceed further in selection process, and (2) that results of such component had disparate impact on plaintiffs' minority group?" (50 U.S.L.W. 3054).

This is really the mirror image of the case before us. In *Teal* and other such cases, *see infra*, the defusing of disparate impact came at the end of the selection process; in the instant case the initial decision to hire only women made defusing unnecessary.

the resulting eligible pool the appointing authority considered past performance, recommendations of supervisors, seniority, and, not least, affirmative action considerations. This particular examination resulted in a pass rate for black candidates that was only 68 per cent that of white candidates. Yet the final result was a promotion rate of 23 per cent of the black applicants and 13.5 per cent of the white applicants.

The case followed and overruled *Brown* v. *New Haven Civil Service Board*, 474 F. Supp. 1256 (D. Conn. 1979), in which, as in most other similar cases up to that time, the court, in examining for disparate impact, had looked at the selection process as a whole, rather than any particular stage or segment.[4] *Brown's* two compelling reasons had been the palpable problems of court management if courts were to examine "subtests, sub-subtests, and even individual questions", *id.* at 1262, and its concern that Title VII not be construed to prevent a municipality's resorting to affirmative action to *guarantee* a fit between minority hiring and the minority applicant pool, not leaving matters entirely to the random workings of a non-discriminatory selection process.

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[4] The *Brown* court's comprehensive catalogue of authorities pursuing this approach is as follows:

"*Friend* v. *Leidinger*, 588 F.2d 61, 66 (4th Cir. 1978), *aff'g* 446 F. Supp. 361 (E.D. Va. 1977); *Rule* v. *Ironworkers Local 396*, 568 F.2d 558, 565, n.10 (8th Cir. 1977); *Smith* v. *Troyan*, 520 F.2d 492, 497-98 (6th Cir. 1975); *Lee* v. *City of Richmond*, 456 F. Supp. 756, 771 (E.D. Va. 1978); *cf. Kirkland* v. *New York State Department of Correctional Services*, 374 F. Supp. 1361, 1370 (S.D.N.Y. 1974), *aff'd in relevant part*, 520 F.2d 420, 425 (2d Cir. 1975) (showing that overall examination procedure has disparate results cannot be rebutted by fragmenting process and showing no disparate results in separate parts); *Vulcan Society of New York City Fire Department, Inc.* v. *Civil Service Commission*, 360 F. Supp. 1265, 1272 (S.D.N.Y.), *aff'd*, 490 F.2d 387 (2d Cir. 1973) (same). *Contra*, *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1372-73 (5th Cir. 1974); *League of United Latin American Citizens* v. *City of Santa Ana*, 410 F. Supp. 873, 894-95 (C.D. Cal. 1976)." 474 F. Supp. at 1261. (Footnote omitted).

In overruling *Brown*, the *Teal* court reasoned that the overview-of-the-whole-process approach is justifiable only where each candidate's total score is made up of negative (disparate impact) and positive (affirmative action) factors in equipoise. All candidates would share in both burdens and offsetting benefits. But, the court concluded, if there is a discriminatory pass-fail barrier that excludes individuals from an opportunity to be later evaluated, belated "corrective" action is of no avail. 645 F.2d at 139.

As our previous discussion would indicate, we do not follow the *Teal* approach. Absent any discriminatory purpose, we see no justification for looking behind a result that does not reveal a hiring that has a disproportionately adverse impact on the relevant minority labor pool. Beyond this, there are prudential problems in trying to distinguish between a selection process which is based on cumulative scores and one which involves a pass-fail threshold followed by other selection steps. As a comment in 23 Boston College Law Review, Dec. 1981, Annual Survey of Labor Law 84, 278-279 puts it:

> "In its discussion of the *Brown* case, the *Teal* court did not address Brown's statement that '[e]ven in a cumulatively scored application process, a score on any single component might be so low as to preclude the accumulation of a total score meeting a minimum hiring requirement.' 474 F. Supp. at 1262, 20 FEP Cas. at 1380. In light of that observation, it is evident that the distinction between the two types of selection processes is not so neat . . . . Furthermore, it is only on the basis of the existence of the distinction that the *Teal* court dismisses the concern that courts will be burdened excessively by examining isolated sub-tests. 656 F.2d at 139, 25 FEP Cas. at 533. . . . The court fails to explain convincingly why the burden of examining sub-tests is lighter in the process with a pass-fail barrier."

We therefore conclude that the district court erred in deeming that the men-women height statistics established a prima facie case under the circumstances we have described. So concluding, we need not decide other issues.

It is perhaps worth emphasizing what we have not held or intimated. First, we have not dealt with a selection process that uses a facially neutral requirement in circumstances belying the good faith of the employer. For example, if it were the case that rather extreme requirements were set with the result that positions nominally reserved for women were seldom filled and then only after inordinate delay, this would involve disparate treatment analysis and the concomitant need, easily met, to prove discriminatory purpose.

Second, this case does not deal with an equal protection challenge against a height restriction on behalf of short women, where there is proof that the employer devised the requirement "at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group. [Footnote omitted.]" *Personnel Administrator of Mass.* v. *Feeney*, 442 U.S. 256, 279 (1979).

Third, this is not a case where the selection process incorporated criteria that were so demeaning to women as to constitute institutionalized harassment. *Cf. Tomkins* v. *Public Serv. Elec. & Gas Co.*, 568 F.2d 1044, 1046 n.1 (3d Cir. 1977) [court does not pass on theory that sexual harassment created "an environment of debilitating sexual intimidation"]; *and Bundy* v. *Jackson*, 641 F.2d 934 (D.C. Cir. 1981) [sexual harassment even without adverse employment consequences, can be a violation of Title VII, in that it creates a "discriminatory environment"].

Finally, this is not a case where there is evidence that replacing one female with another was to cover up a discriminatory act. *See Equal Employment Opportunity Commission* v. *Tufts Institution of Learning*, 421 F. Supp. 152, 165 (D. Mass. 1975).

The part of the judgment relating to denial of employment from the all-women list of August 12, 1974 is accordingly reversed.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

LYNDA LeBOEUF COSTA, PLAINTIFF	:	
	:	C. A.
v.	:	No. 75-2915-K
JOHN MARKEY, et al., DEFENDANTS	:	

April 24, 1981

FINAL JUDGMENT

I. *Appointment*

A. David Marchand, Personnel Administrator of Division of Personnel Administration, as successor to defendant Anne Ramsey, shall revive the all-woman list of police officers certified in 1974 to the City of New Bedford, said list consisting of the name of Lynda LeBoeuf Costa, subject to her passing a physical examination administered by the Division of Personnel Administration.

The Personnel Administrator will notify the members of the Massachusetts Civil Service Commission that it is requesting the revival of an eligibility list containing the plaintiff's name (Lynda LeBoeuf Costa) pursuant to St. 1976, c. 539.

B. The current members of the Massachusetts Civil Service Commission, as successors to those named in LeBoeuf v. Markey, shall approve the revival of the list pursuant to St. 1976, c. 534 and shall notify the Personnel Administrator of said approval.

C. Upon approval, the administrator forthwith shall certify the name of Lynda LeBoeuf Costa to the City of New Bedford for appointment as a police officer.

D. The City of New Bedford and its officials and agents shall promptly appoint Lynda LeBoeuf Costa as a police officer of the New Bedford Police Department within ten (10) days of her certification by the Personnel Administrator.

E. Plaintiff shall be placed in the status for current and future pay that she would have occupied had she been appointed on September 22, 1974 with Jeanne Lawrence and Shirley Arsenault.

F. Except as hereinafter stated, plaintiff shall be given full seniority privileges as if she had been appointed on September 22, 1974 immediately prior to Jeanne Lawrence and Shirley Arsenault. These privileges include, but without limitation, election of vacations, number of vacation weeks, transfer rights and bidding rights. However:

1. Plaintiff shall not accrue retroactive seniority for purposes of eligibility for promotional exams (Mass. Gen. Laws c. 31, § 59).

2. Until the plaintiff has completed three (3) months' recruit training pursuant to applicable state law, plaintiff will be required to be assigned to limited (inside) duty.

3. Following completion of said recruit training, plaintiff will comply with the Union contract provision which now requires all new recruits to be first assigned to the Uniform Patrol Division Nights for three (3) years subject, however, to all bidding rights which she will have based on seniority as stated above.

4. Upon appointment, plaintiff shall be required to satisfactorily complete training at a police academy (Mass. Gen. Laws c. 41, § 96B) and serve a probationary period (Mass. Gen. Laws c. 31, § 61) before her appointment becomes permanent.

5. Plaintiff will be credited with fifteen (15) days of sick leave.

G. The Court shall retain jurisdiction of this matter during plaintiff's probationary period.

II. *Back Pay*

A. The City Defendants shall pay the Plaintiff back pay from September 24, 1974 to February 28, 1981, the sum of Twenty Five Thousand Three Hundred Fifty Four and 12/100 ($25,354.12) dollars.

B. The City Defendants shall pay the Plaintiff the sum of $7,028.11 as interest on the back pay of eight (8%) percent per annum through February 28, 1981, plus interest at eight percent (8%) per annum on $25,354.12 from that date to the date of this order.

C. City Defendants shall deduct five percent (5%) of the total sum awarded as back pay (pursuant to Paragraph 11A of this order) as the plaintiff's employee's contribution to the City Defendant's Retirement Program administered in accordance with state law and the City shall contribute any sums required to be deposited by it in accordance with said program.

III. *Attorney's Fees*

Subject to the stipulations made and referred to in Paragraph IV.A. herein, the City defendants shall pay the plaintiff attorney's fees for the period through February 28, 1981 in the amount Eleven Thousand ($11,000.00) dollars.

IV. *Stipulations*

A. The parties have stipulated as to the amount of back pay, interest and attorney's fees through February 28, 1981. However, City and State defendants have reserved the right to appeal on all issues raised during the trial. These issues include, without limitation: the underlying issue of discrimination; the locus of responsibility for such discrimination, City

and/or State; the award of back pay, interest and attorneys fees, and responsibility for payment of such award by City and/or State defendants.

B. Pending any appeal filed by either the City and/or State defendants, the City with the approval of the State defendants, has tendered to the plaintiff the position of police officer for the City in the status for current pay that she would have received and occupied had she been appointed on September 24, 1974 with Jeanne Lawrence and Shirley Arsenault. The plaintiff has now accepted this tender.

C. In the event an appellate court rejects the order of appointment to the position of police officer under the terms of the Final Judgment, the parties have agreed to retain the plaintiff in the position of police officer at a rate of pay and level of seniority effective as of the actual date of her appointment.

Robert E. Keeton,
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

LYNDA LeBOEUF COSTA, PLAINTIFF	:	
	:	C. A.
v.	:	No. 75-2915-K
JOHN MARKEY, et al., DEFENDANTS	:	

December 4, 1980

Memorandum and Order

The matters before the court are issues relating to the terms of judgment consistent with the rulings of the court in the Memorandum and Order of September 16, 1980, and determinations to be made at this time on remaining issues, in light of additional submissions of the parties.

I.

Plaintiff argues that the state defendants, along with the city defendants, should be held jointly and severally liable for both back pay and attorneys fees. In the Memorandum and Order of September 16, 1980, however, the court concluded that the sole basis for awarding back pay was denying plaintiff appointment from the All-Women List by the city defendants' application of a city-determined minimum height requirement. No basis was found, and none is now found, for holding state defendants accountable for this action of the city defendants. 42 U.S.C. § 2000e-5(g) provides that a back pay award is "payable by the employer, employment agency or labor organization . . . responsible for the unlawful employment practice." Even if state defendants were considered to be within the group subject to liability for back pay, they are

not, on the evidence and findings of the court in this case, among those "responsible" for the improper employment practice by reason of which back pay is awarded. *Cf. Guerra* v. *Manchester Terminal Corp.*, 498 F.2d 641, 656 (5th Cir. 1974). Plaintiff's request that state defendants be held jointly and severally liable for the award of back pay is denied.

State defendants are appropriately made parties to the order for equitable relief allowed the plaintiff. They must take actions consistent with the court's order to make the equitable relief fully effective. This need for their presence as parties, however, is not in itself a sufficient ground for awarding plaintiff's attorney's fees against state defendants. The central basis for both the back pay award and the equitable relief allowed in this case is the improper application of the height requirement by city defendants. Insofar as plaintiff has asserted that state defendants directed or supervised or caused this improper action of city defendants, the court has found against plaintiff's claim. 42 U.S.C. § 2000e-5(k) grants a court discretion in awarding attorney's fees to a prevailing party. Such discretion may be exercised in determining which defendant, among several, should be held liable for attorney's fees. *See Chastang* v. *Flynn & Emrich Co.*, 541 F.2d 1040, 1044-45 (4th Cir. 1976); *Wisconsin Socialist Workers 1976 Campaign Committee* v. *McCann*, 460 F. Supp. 1054, 1058 (E.D. Wis. 1978). In light of the limited extent to which the state defendants' conduct contributed to the circumstances leading to this lawsuit, plaintiff's request that state defendants be held jointly and severally liable for an award of attorney's fees is denied.

II.

Should interest be awarded on back pay and, if so, in what amount?

Back pay is an indebtedness arising out of a violation of a statutorily-imposed obligation and is aimed at making the plaintiff whole. Interest to compensate for loss from delayed payment is likewise aimed at making the plaintiff whole. It is therefore appropriate that it be awarded in a case such as the present one. *Cf. McClanahan* v. *Mathews*, 440 F.2d 320, 325-326 (6th Cir. 1971) (interest on NLRB award of back pay).

With respect to the method of calculating interest, plaintiff proposes computation on an annual rather than quarterly basis (the quarterly basis being more favorable to plaintiff), the evidence introduced in this case not having disclosed earnings on a quarterly basis. The court concludes that computation on an annual basis is appropriate in this case.

In the absence of an applicable rule of federal practice, United States district courts commonly apply the rate prescribed by state law for the most nearly analogous circumstances. In this instance, the rate established by state law for contract actions generally, including actions on employment contracts, is the most nearly analogous rule. Mass. Gen. Laws c. 231, § 6C, as amended in 1974, provides that the interest rate be 8 per cent per annum.

Plaintiff contends that the rate should be increased to 10 per cent per annum effective September 19, 1980, because of the amendment of c. 231 § 6C effective that date. However, the amending act, Mass. Reg. Session 1980, c. 322, § 3, explicitly declares that the amendment "shall apply to causes of action commenced on and after the effective date of this act." The court therefore concludes that the rate to be applied is 8 per cent per annum.

Plaintiff contends that the interest should be compounded quarterly. Section 6C, however, provides for simple rather than compounded interest, and this court will follow the statutory rule of simple interest at 8 per cent per annum.

This rate is to be applied to the annual net difference between what plaintiff would have received as pay (excluding overtime) had she been appointed from the All-Women List and what she did earn. In view of the previous submissions of the parties, it appears likely that the determination of the annual figures can now be made by counsel in accordance with this ruling, without further dispute. Counsel are directed to confer for this purpose and advise the court promptly.

With respect to sick leave, the city defendants have proposed, as a compromise and without prejudice to their position, that a credit of fifteen days of accumulated sick days be included as an element of the equitable relief awarded. Absent a showing of good cause by plaintiff for a different disposition of this matter, the relief awarded will include a credit of fifteen sick days.

IV.

With respect to interim appointment, city defendants have agreed, subject to reservation of their appellate rights on other issues, that an appeal and its outcome would not affect plaintiff's appointment, though it might affect retroactive back pay, seniority, interest, and retirement benefits. If such an interim appointment is opposed, either by plaintiff or by state defendants, opposition, stating grounds therefor, shall be filed in writing, within seven days. If no opposition has been filed within the time permitted, the court proposes to order the interim appointment promptly and submits to the parties for their consideration the following proposed terms of the order:

Order for Interim Appointment

A. David Marchand, Personnel Administrator of the Divi-

sion of Personnel Administration, as successor to defendant Anne Ramsey, shall revive the all-woman list of police officers certified in 1974 to the City of New Bedford, said list consisting of the name of Lynda LeBoeuf Costa, subject to her passing a physical examination administered by the Division of Personnel Administration.

B. The current members of the Massachusetts Civil Service Commission, as successors to those named in *LeBoeuf* v. *Markey, et al.*, shall approve the revival of the list pursuant to St. 1976, c. 534.

C. Upon approval, the Personnel Administrator shall certify the name of Lynda LeBoeuf Costa to the City of New Bedford for appointment as a police officer.

D. The City of New Bedford and its officials and agents shall promptly appoint Lynda LeBoeuf Costa as a police officer of the New Bedford Police Department.

E. Plaintiff shall be placed in the status for current and future pay that she would have occupied had she been appointed on September 22, 1974 (with Jeanne Lawrence and Shirley Arsenault).

F. Except as hereinafter stated, plaintiff shall be given full seniority privileges as if she had been appointed on September 22, 1974 immediately prior to Jeanne Lawrence and Shirley Arsenault. These privileges include, but without limitation, election of vacations, number of vacation weeks, transfer rights and bidding rights. However:

1. Plaintiff shall not accrue retroactive seniority for purposes of eligibility for promotional exams (Mass. Gen. Laws c. 31, § 59).

2. Until the plaintiff has completed three (3) months' recruit training pursuant to applicable state law, plaintiff will be required to be assigned to limited (inside) duty.

3. Following completion of said recruit training, plain-

tiff will comply with the Union contract provision which now requires all new recruits to be first assigned to the Uniform Patrol Division Nights for three (3) years subject, however, to all bidding rights which she will have based on seniority as stated above or any contract amendments.

4. Upon appointment, plaintiff shall be required to satisfactorily complete training at a police academy (Mass. Gen. Laws c. 41, § 96B) and serve a probationary period (Mass. Gen. Laws c. 31, § 61) before her appointment becomes permanent.

5. Plaintiff will be credited with 15 days sick pay.

G. The Court shall retain jurisdiction of this matter during plaintiff's probationary period.

V.

A conference is scheduled for December 11, 1980 at 2:30 p.m., to determine whether plaintiff and city defendants can stipulate upon the amount to be awarded as attorneys fees, city defendants reserving their rights to challenge on appeal the determination that attorneys fees be awarded, as distinguished from challenging the amount. If no stipulation is reached as to the amount, or as to a procedure for determining the amount without full hearing by the court, counsel should be prepared to proceed with the hearing. Attention is directed to the attached memorandum regarding procedures for determining awards of attorneys fees.

Robert E. Keeton,
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

LYNDA LeBOEUF COSTA,	:	
PLAINTIFF	:	
	:	C. A.
v.	:	No. 75-2915-K
	:	
ANNE RAMSEY, et al.,	:	
DEFENDANTS	:	

September 16, 1980

Memorandum and Order

I. Introduction

This is an action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and under 42 U.S.C. § 1981 and 42 U.S.C. § 1983 and the Fourteenth Amendment, alleging discrimination in employment on the basis of sex. Plaintiff alleges, first, that defendants rejected her for a position on the New Bedford Police Department because of the application of a minimum height requirement and, second, that the imposition of the height requirement had a discriminatory impact on women.

The case came on for trial before the court on May 20 and 21, 1980. Arguments were heard on May 27, 1980, and the parties were allowed time to file additional memoranda. After consideration of the evidence adduced and the arguments made at trial and the proposed findings and conclusions,[1] memoranda, and other documents submitted by the

[1] Before and at the time of trial the parties filed proposed findings of fact and conclusions of law upon which the opposing parties had indicated, by underlining, those proposed findings that were contested. Accordingly, all non-underlined proposed findings of fact contained in State Defendants' Proposed Findings and Conclusions (which city defendants indicated was a joint submission) and

parties, the court has reached the findings and conclusions stated here.

II. Jurisdiction

This court has subject matter jurisdiction over this case under 28 U.S.C. §§ 1331, 1343(3) and (4), and 42 U.S.C. § 2000e-5(f).

III. Findings of Fact

A.

Plaintiff Lynda L. LeBoeuf, now known as Lynda L. Costa, is a thirty-two year old woman who is five feet three inches tall.

Defendant John A. Markey is the Mayor of the City of New Bedford and has been since 1971. In that capacity he has the appointing authority for the Police Department.

Defendant Joseph A. Pelletier is the Chief of Police of the City of New Bedford and has been since May, 1970. In that capacity he is responsible for the supervision, control, and management of the New Bedford Police Department.

Defendants Rosalind Pool Brooker, Brian Lawler, Donald R. Poory, George Rogers, William Saltzman, Paul G. Hamel, Richard Bachand, Donald R. Nelson, Richard Hinkle, Manuel F. Neto, and Ralph J. Saulnier comprised the New Bedford City Council on or about July 1, 1975. In that capacity they reviewed all bills and requirements submitted by the Mayor. They also had power to confirm appointments of police officers submitted by the Mayor.[2]

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all proposed findings of fact contained in Plaintiff's Proposed Findings and Conclusions that were not underlined by either state defendants or city defendants may be taken as established.

[2] Defendants referred to in this paragraph, together with defendants Markey and Pelletier, are hereinafter referred to collectively as the "city defendants."

Defendants Nancy Beecher, Wayne A. Budd, Richard J. Healey, Richard Linden, and John Donegan comprised the Massachusetts Civil Service Commission on or about July 1, 1975. Since that time Amelia Miclette has replaced Nancy Beecher as Chairperson of the Commission.

The Director of Civil Service for the Commonwealth of Massachusetts from at least July 1, 1973 through July 1, 1975, was Edward W. Powers. On July 1, 1975, the position of Director of Civil Services was abolished and the duties of the Director were allocated to the newly created position of Personnel Administrator. On July 1, 1975, defendant Anne Ramsey assumed the duties of Personnel Administrator. The position is now held by David Marchand.[3]

B.

Appointments to the New Bedford Police Department are subject to Massachusetts Civil Service laws, rules, regulations, and practices.

The New Bedford Police Department makes appointments from a list of eligible applicants that is certified to it by the state civil service personnel division. The certified lists at the center of this litigation were derived from a 1972 written examination for the position of police officer. Applicants' names appeared on this list in order of their scores on the test, adjusted for various statutory[4] and court-ordered[5] preferences.

On July 24, 1973, the New Bedford City Council approved Mayor Markey's establishment of a minimum height requirement for police officers of 5 feet 6 inches. At the time, a

[3] Defendants referred to in this paragraph and the preceding paragraph are hereinafter collectively referred to as the "state defendants."

[4] *See, e.g.*, Mass. Gen. Laws c. 31, § 26, regarding veterans' preferences under current law.

[5] *See Castro* v. *Beecher*, 459 F.2d 725 (1st Cir. 1972), *on remand*, 365 F. Supp. 655 (D. Mass. 1973).

Massachusetts statute authorized such action.[6] Appropriate state authorities were notified of the adoption of the height requirement. Prior Massachusetts law had also authorized imposition of a height requirement, and the City of New Bedford had first adopted a height requirement for police officers in 1972. New Bedford abolished the height requirement in November 1974.[7]

Before 1974, men and women police personnel in New Bedford held distinct positions with distinct duties, the men serving as "police officers" and the women as "policewomen." Different examinations were administered for the two positions. After February 1974 both men and women were eligible to be "police officers" and were appointed from so-called "integrated lists" derived from a common examination. Nevertheless, female police officers were not permitted to engage in street duty until January, 1977.

In the spring of 1973 New Bedford's certified list of eligible applicants for policewomen expired by operation of law. On or about that time New Bedford had an opening for at least one policewoman position and requested that the Division of Civil Service hold an open competitive examination for the position. No such examination was ever held. The city continued to seek a policewoman. It was advised that an exemption would have to be sought from the Massachusetts Commission Against Discrimination ("MCAD") since a gender-specific hiring was to be made. Such a request was submitted by letter of March 29, 1974.[8] MCAD replied by letter of May 9, 1974, authorizing New Bedford to use the certified list for policewomen already in existence for Taunton, Massachu-

[6] Mass. St. 1973, c. 351.

[7] Mass. St. 1974, c. 762, approved August 8, 1974 and effective November 8, 1974, abolished any height requirement for the position of police officer unless the appointing authority petitioned the appropriate state agency for such a requirement and included with the request a validation study.

[8] Plaintiff's Exhibit 1.

setts.[9] This list was never certified to New Bedford by the Division of Civil Service.

The Division of Civil Service supplied New Bedford with a certified list of eligible applicants for police officer on July 30, 1974. This was an "integrated list," containing names of eligible men and women ranked in accordance with scores on the 1972 examination, adjusted for various statutory and court-ordered preferences.[10] Plaintiff's name was not contained on this list.

On August 7, 1974, Edward M. Powers, then Director of the Division of Civil Service, notified Mayor Markey that plaintiff's name inadvertently had been omitted from the list. He instructed the Mayor to insert her name after that of William Grovell and before that of John Lopes. This position was consistent with the ranking that would have been afforded to an applicant who not only had scored 93.3% on the examination (as plaintiff had) and was a non-veteran resident of New Bedford (as plaintiff was) but also was a member of a racial minority to be accorded preference under *Castro, supra* (which plaintiff was not). Plaintiff's name should have been placed on the list in a position consistent with someone who had scored 93.3% on the 1972 written examination and was a non-minority, non-veteran resident of New Bedford.

On or about February 25, 1975, the Division of Civil Service took steps to correct the erroneous ranking of plaintiff on the list and by letter instructed New Bedford to place her name below that of Robert L. Linquest and above that of James F. Camacho, Jr., both of whom had filed applications for the police officer examination that indicated that they were non-minority, non-veteran residents of New Bedford. Neither Camacho nor Linquest has been appointed a police officer in New Bedford as a result of the July 30, 1974 certification.

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[9] Defendants' Exhibit 9.

[10] See text at nn.4 and 5, *supra*.

Both Grovell and Lopes, between whose names plaintiff's was originally placed, were appointed from the July 30 list.

As a result of the error in the initial placement of her name, plaintiff was interviewed in August, 1974 for the position of police officer in New Bedford. She was rejected because she failed to meet the 5 feet 6 inches height requirement. If plaintiff's name had been placed on the list in the proper position, her name would not have been reached and she would not have been interviewed for the position of police officer in August, 1974. This list has now expired. The name of the last person to be appointed from the list appears on the list above the plaintiff's name. No man whose name appears below plaintiff's on the list was appointed from the list. Several women whose names appear below the plaintiff's were appointed from lists derived from this list.[11]

The Division of Civil Service in compiling the list from the 1972 examination did not take account of an applicant's height. The height requirement was a local option permitted by statute, and some municipalities did not impose a height requirement. Accordingly, applicants who failed to satisfy a municipal height requirement were rejected at the time of the interview by the municipality.

Because of its continuing need for a female police officer to perform special duties, related, for example, to female prisoners, and because no woman's name appeared sufficiently high on the July 30, 1974 list to be reached in the normal course, New Bedford requested and received a special list, dated August 12, 1974, that was derived from the July 30, 1974 list but contained only the names of female applicants. Plaintiff's name appeared first on this list.

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[11] Jeanne F. Lawrence and Shirley R. Arsenault were appointed from a special list of female applicants when plaintiff and Carol A. Sacremento were rejected for failure to meet the height requirement. These appointments are described immediately *infra*. Ms. Sacremento was appointed as a result of a settlement reached in a dispute over the failure to appoint her from the all-women list.

Two appointments were made from the August 12 list.[12] The appointees ranked third and fourth on the list.[13] They both were at least 5 feet 6 inches tall. Plaintiff and the woman who ranked second were both less than 5 feet 6 inches tall and were rejected because they failed to satisfy the minimum height requirement.

Plaintiff offered at trial two sets of statistics to show the differential impact of a height requirement upon women as compared to men.[14] The first set was a table entitled "Height in inches, average height and selected percentiles, by age and sex: United States, 1960-62." This table was described at trial by plaintiff's counsel as being a National Health Service Survey compiled by HEW. It is described in plaintiff's proposed findings of fact as a compilation by the National Center for Health Statistics published in a booklet entitled "Weight, Heights, and Selected Body Dimensions of Adults," U.S. 1960-62.[15] The second set of statistics was a table entitled "Average Heights and Weights, By Age and Sex: 1960-1962 and 1971-1974." At trial plaintiff's counsel described this table as coming from the same source as the first table. Defendants indicated that they did not object to the introduction of these statistics on hearsay or authentication grounds but that they did object on the ground that the statistics did not have a sufficiently close nexus to this case. Defendants' objection was overruled.

The first set of statistics contains a wealth of data relative

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[12] See note 11, *supra*.

[13] At the time, former Mass. Gen. Laws c. 31, § 15B (now Mass. Gen. Laws c. 31, § 27) required that an appointment from a list of three or more eligible applicants willing to accept the position be made from one of the first three positions and that written explanation be given if the highest applicant on the list was not selected.

[14] Plaintiff's Exhibit 12.

[15] Plaintiff's Proposed Finding of Fact 26.

'o heights of men and women in the period 1960-1962, among which are the following:

1. For men between the ages of 18 and 24 years:
   (a) average height: 68.7 inches, or 5 feet 8.7 inches.
   (b) 20th percentile[16] height: 66.5 inches, or 5 feet 6.5 inches.
2. For men between the ages of 25 and 34 years:
   (a) average height: 69.1 inches, or 5 feet 9.1 inches.
   (b) 20th percentile height: 66.8 inches, or 5 feet 6.8 inches.
3. For women between the ages of 18 and 24 years:
   (a) average height: 63.8 inches, or 5 feet 3.8 inches.
   (b) 80th percentile[17] height: 65.9 inches, or 5 feet 5.9 inches.
4. For women between the ages of 25 and 34 years:
   (a) average height: 63.7 inches, or 5 feet 3.7 inches.
   (b) 80th percentile height: 65.7 inches, or 5 feet 5.7 inches.

The second set of statistics repeats the average height data for the years 1960-1962 contained in the first set and also contains the following information regarding average heights for the period 1971-1974:

1. Ages 18-24 years:
   (a) men: 69.7 inches, or 5 feet 9.7 inches.
   (b) women: 64.3 inches, or 5 feet 4.3 inches.

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[16] "Percentile" is "a value on a scale of one hundred that indicates the percent of a distribution that is equal to or below it." Webster's New Collegiate Dictionary (1979). For example, that the 20th percentile height for men between 18 and 24 is 66.5 inches indicates that 20% of the men in that age group are 66.5 inches tall or less.

[17] In other words, 80% of the women in the age group were 65.9 inches tall or less.

2. Ages 25-34 years:
   (a) men: 69.6 inches, or 5 feet 9.6 inches.
   (b) women: 64.1 inches, or 5 feet 4.1 inches.

On or about September 9, 1974, plaintiff filed a charge of discrimination with MCAD, complaining of violations of the Civil Rights Act of 1964.

On or about September 16, 1974, plaintiff filed a charge of discrimination with the United States Equal Employment Opportunity Commission ("EEOC"), complaining of violations of the Civil Rights Act of 1964.

On December 20, 1974 MCAD issued a finding of probable cause of sex discrimination against the defendants. The probable cause finding states in its conclusion:

> Conclusion - the 5' 6" height requirement has a disparate impact on women and has not been shown to be job related; because she did not meet this requirement complainant was denied a position as police officer, and seven males that were below her on the certification list were appointed. The evidence therefore supports the finding of probable cause to believe that complainant was denied appointment because of her sex.

On April 1, 1975 MCAD notified New Bedford that part of its probable cause decision was based on a mistake but that nevertheless MCAD, after reviewing the evidence, reaffirmed the decision of probable cause for the following reason:

> But for the height requirement the complainant would have been appointed as a police officer pursuant to the selective certification process. As a woman she has standing to challenge this height requirement as being discriminatory towards women. The evidence set forth in the September [sic] twentieth finding provides probable cause to believe that the height requirement discriminates against women and was illegal under Chapter 151B.

These probable cause findings were not introduced at trial. It appears that the mistake referred to in the April 1 communication probably related to an initial, mistaken understanding by MCAD that the initial (erroneous) placement of plaintiff's name on the July 30, 1974 list was the correct placement of her name on that list.

EEOC has issued plaintiff a notice of right to sue.

III. *Claim under 42 U.S.C. § 1981*

Although plaintiff's complaint asserts a violation of 42 U.S.C. § 1981,[18] it is not at all clear that she intends to press this claim, since memoranda of law filed by her at and after trial do not advert to a violation of § 1981.[19] In any event, "[t]he overwhelming weight of authority holds § 1981 not applicable to discrimination based on sex." B. Schlei and P. Grossman, *Employment Discrimination Law* 610 (1976) (see 1979 Supplement at 139). Plaintiff is not entitled to recover under 42 U.S.C. § 1981.

IV. *Claim under 42 U.S.C. § 1983*

42 U.S.C. § 1983[20] creates a remedy but does not itself confer any substantive rights. *Chapman* v. *Houston Welfare Rights Organization*, 441 U.S. 600, 617-618 (1979) ("one can-

[18] 42 U.S.C. § 1981 provides in relevant part as follows:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens. . . .

[19] See Plaintiff's Supplemental Memorandum of Law, filed May 20, 1980 at trial, and Plaintiff's Memorandum of Law on Damages, filed June 9, 1980 (Document 18).

[20] 42 U.S.C. § 1983 provides as follows:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

not go into court and claim a 'violation of § 1983' - for § 1983 by itself does not protect anyone against anything"; "[s]tanding alone, § 1983 clearly provides no protection for civil rights since . . . § 1983 does not provide any substantive rights at all"). Typically, § 1983 has been invoked to remedy alleged violations of the Fourteenth Amendment. Recently the Supreme Court has indicated that § 1983 encompasses not just claims of constitutional violations but also claims based solely on violations of federal statutory law. *Maine* v. *Thiboutot*, 48 U.S.L.W. 4859 (June 25, 1980).

The only federal statutory provision arguably violated in this case is Title VII.[21] The decision of the Supreme Court in *Great American Federal Savings & Loan Association* v. *Novotny*, 442 U.S. 366 (1979), indicates by implication that a right created by Title VII cannot be the basis for a cause of action under § 1983. *Novotny* deals with an attempt to invoke 42 U.S.C. § 1985(c), like § 1983 a remedial provision creating no substantive rights, to redress an alleged violation of Title VII. Focusing on the fact that allowing a violation of Title VII to be asserted through the remedial framework of § 1985(c) would allow the claimant to bypass the critical administrative process and other detailed and specific provisions of Title VII, the Court held that deprivation of a right created by Title VII cannot be the basis for a cause of action under § 1985(c). Plaintiff has no viable statutory § 1983 claim.

The heart of plaintiff's § 1983 claim is her assertion of a violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. To make out this claim plaintiff must show that defendants acted with discriminatory purpose. *Washington* v. *Davis*, 426 U.S. 229 (1976).

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[21] Plaintiff has not asserted the violation of any federal statute as the basis for her § 1983 claim. Nevertheless, it seems appropriate for the court to address this potential basis for relief. Plaintiff has asserted a violation of Title VII. If a violation is found and plaintiff could invoke § 1983 to remedy that violation, the scope of available remedies would be enhanced.

> "Discriminatory purpose," however, implies more than intent as volition or intent as awareness of consequences. . . . It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effect upon an identifiable group.

Personnel Administrator v. *Feeney*, 442 U.S. 256, 279 (1979). A showing of a disproportionate impact is relevant to this determination since discriminatory purpose may be inferred from the totality of the relevant facts, but standing alone, without a finding of discriminatory purpose, disproportionate impact does not establish a violation of the equal protection clause. *Washington* v. *Davis, supra,* at 241, 242; *Personnel Administrator* v. *Feeney, supra,* at 274, 275, 279 nn.24, 25; *see Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 264-268 (1977).

In this case, based on the totality of the circumstances, the court concludes that defendants did not act with forbidden discriminatory purpose in imposing a height requirement on candidates for police officer. At the time the requirement was imposed a state statute authorized its imposition. Although the city defendants had not and have not undertaken any validation studies to establish the job-relatedness of the height requirement, the court concludes that at the time the requirement was imposed defendants believed that it was job-related and that the height requirement was not adopted "because of" its adverse effect upon women. During the period in question the city defendants were affirmatively seeking female police personnel. Although the city defendants after adopting a unitary selection procedure continued until 1977 to differentiate between male and female police officers in terms of assigned duties, plaintiff cannot establish a Fourteenth Amendment cause of action on this basis, since she was neither on the police force then nor able to establish a Fourteenth Amendment cause of action for denial of her application.

Because the court concludes that defendants did not act with forbidden discriminatory purpose in imposing the height requirement, plaintiff's Fourteenth Amendment equal protection claim fails.

V. *Claim Under Title VII*

A. Nature of the Cause of Action

Title VII is the source of a legal duty regulating the conduct of certain actors. It may be helpful to view it, like 42 U.S.C. § 1983, as creating a species of liability in the nature of tort, *cf. Imbler* v. *Pachtman*, 424 U.S. 409 (1976), although, of course, the remedies contemplated by Title VII differ from those traditionally available in tort. *See* 42 U.S.C. § 2000e-5(g).

In the traditional tort context, a plaintiff, in order to establish a cause of action, must prove not only a violation of a legal duty to the plaintiff but also that the violation has had an impact on some legally protected interest of the plaintiff. In the language of the shorthand formulation often used to describe the elements of a cause of action for common law negligence, a plaintiff must establish: (1) duty, (2) breach of duty, (3) cause, and (4) harm. *See* W. Prosser, Torts § 30 (4th ed. 1971); Restatement (Second) of Torts § 281 (1965). The existence of the first and second elements of this formulation make the defendant's conduct negligent, or, more generally put, wrongful. The existence of the third and fourth elements make the negligent (or wrongful) conduct of the defendant actionable by the plaintiff. *See* Restatement (Second) of Torts § 281, comment *a* (1965).

This same framework can profitably be applied to analyze plaintiff's Title VII claim. In particular, the issues raised by the distinctive circumstances of the two applications of the minimum height requirement against plaintiff - once to deny

her an appointment from the all-women list - are by nature closely analogous to those commonly, though not uniformly,[22] referred to in the basic law of torts as issues of legal cause.

B. Legal Duty and Violation

In the context of a Title VII claim, the statute itself is the source of the relevant legal duty. The nature and dimensions of that duty are fleshed out by precedents interpreting the statute. Decisions of the Supreme Court make clear that in a Title VII[23] disparate impact[24] case, to establish a prima facie

[22] Although the terminology of "proximate cause" or "legal cause" is more often used, these issues are sometimes referred to in terms of "duty." *See, e.g.*, W. Prosser, Torts § 43, at 250 (4th ed. 1971). Such use of the term "duty" is fundamentally different from the use of the term in this opinion, since it subsumes issues addressed here under the rubric of "legal cause."

[23] The relevant substantive provision of Title VII in this case is codified at 42 U.S.C. § 2000e-2, which provides in relevant part as follows:

(a) It shall be an unlawful employment practice for an employer —

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

It may be noted that plaintiff has not named the City of New Bedford as a defendant in this action. She has, however, sued in their official capacities the persons with authority to make and approve appointments of members of the police force. These defendants in their official capacities may be taken to be "an employer" within the meaning of 42 U.S.C. § 2000e-2.

[24] There are two basic genres of Title VII employment discrimination cases: disparate treatment cases and disparate impact cases. *See, e.g., Furnco Construction Corp.* v. *Waters*, 438 U.S. 567, 581-582 (1978) (Marshall, J., dissenting).

case of violation of the statute,

> a plaintiff need only show that the facially neutral standards in question select applicants for hire in a significantly discriminatory pattern. Once it is thus shown that the employment standards are discriminatory in effect, the employer must meet "the burden of showing that any given requirement [has] . . . a manifest relationship to the employment in question." *Griggs* v. *Duke Power Co.* [401 U.S. 424], at 432. If the employer proves that the challenged requirements are job related, the plaintiff may then show that other selection devices without a similar discriminatory effect would also "serve the employer's legitimate interest in 'efficient and trustworthy workmanship.' " *Albemarle Paper Co.* v. *Moody,* [422 U.S. 405], at 125, quoting *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, 801.

Dothard v. *Rawlinson,* 433 U.S. 321, 329 (1977).

Statistics offered by plaintiff establish the significantly disparate impact of a 5 feet 6 inches minimum height requirement upon women as compared to men. Generalized national statistics, such as those offered by plaintiff here, will suffice to make out a prima facie case of violation of Title VII; plaintiff was not required to adduce comparative statistics concerning actual applicants for police officer positions. *Id.,* at 330. Plaintiff's statistics make out a prima facie case of violation of Title VII through unlawful discrimination on the basis of sex.

Defendants do not deny that as a general proposition application of a 5 feet 6 inches minimum height requirement to a group of men and women will have a disparate impact on the women. They also do not deny that plaintiff was rejected for appointment because of the application of the height requirement to her. Rather, they argue that plaintiff suffered no discrimination as a result of the imposition of the height

requirement. Their theory is twofold. With respect to the refusal to appoint plaintiff from the integrated list when her name was called, defendants assert that because plaintiff's name was located erroneously on the list and would not have been reached had it been properly located, there was no discrimination as to which plaintiff is entitled to complain.[25] With respect to the refusal to appoint plaintiff from the all-women list, defendants assert that as a matter of law there can be no discrimination on the basis of sex involved in the choice of one woman over another from a pool comprised only of female applicants.

Although deserving consideration in relation to issues in this case of legal cause and of existence of remediable harm, these arguments are not persuasive in relation to the question of the existence of a violation of Title VII. Plaintiff's prima facie case of violation of the statute relative to the general discriminatory impact of the height requirement upon women remains unrebutted. City defendants did act in violation of Title VII when they applied a minimum height requirement, which requirement had a negative disparate impact on female applicants for employment in the city's police force. There remain, however, issues of legal cause and of existence of remediable harm to plaintiff.

C. Legal Cause and Remediable Harm

As previously indicated (see Subpart A, *supra*), in order to establish a cause of action, plaintiff must prove not only a violation of a legal duty to her but also that the violation has had an impact upon some legally protected interest of hers. The second part of this formulation - that the violation has

[25] Defendants couch this argument in terms of plaintiff's lack of standing, because of no injury in fact, but their argument can also be read as an assertion that plaintiff has failed to state a claim upon which relief can be granted.

had an impact upon some legally protected interest of plaintiff's - involves related issues of legal cause and existence of remediable harm.

(1) The Standard for Determining Legal Cause

Proof of legal cause is essential to the existence of a cause of action entitling plaintiff to any relief whatsoever. *See Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274, 285-287 (1977). Legal cause subsumes two elements: (1) causation in fact, traditionally expressed either as a requirement that the conduct in question be a "substantial factor" in bringing about the harm or as a requirement that the harm would not have occurred "but for" the conduct in question; *compare* Restatement (Second) of Torts § 431 (1965) *with* E. Devitt & C. Blackmar, Federal Jury Practice and Instructions § 80.18 (1977); and (2) rules limiting the scope of liability because of the manner in which the conduct has resulted in the harm.[26] *See* Restatement (Second) of Torts § 431 (1965); W. Prosser, Torts § 42 (4th ed. 1971).

In the context of the basic law of torts, two contrasting points of view have influenced the development of the doctrine of legal cause in relation to the second of these elements. One of those points of view, supported by reasoning that the scope of liability should be commensurate with the basis of liability, favors an explicit rule limiting the scope of liability for negligence to persons within the risks by reason of which defendant's conduct is determined to be negligent,[27] and if rigorously extended, favors limiting the

[26] For example, a rule requiring that the harm was a natural and probable consequence of the conduct. *See* E. Devitt & C. Blackmar, Federal Jury Practice and Instructions § 80.18 (1977).

[27] This point of view, applied to the persons-within the-risk issue, is expressed in the majority opinion in *Palsgraf* v. *Long Island R.R.*, 248 N.Y. 339, 162 N.E. 99 (1928) (Cardozo, J.). The policy

scope of liability to results within the scope of those risks.[28] The other point of view, focusing somewhat more upon the way the injury is "connected with the negligence" and taking into account "many considerations" of policy and practical judgment, aims to determine whether the connection is such that the injury may be said to have been proximately caused by the negligence.[29] Among these "many considerations," however, "foreseeability of the harm" (a concept very close to "result within the scope" of relevant risks) has been most prominent.[30] Thus, under each of these mainstreams of thought about legal cause, concern about whether the harm at issue is of the general type the legal rule was designed to redress is a major influence on the decision that plaintiff's harm was or was not legally caused by defendant's wrongful conduct. Moreover, this general principle of limiting the scope of liability by a standard related to the reasons for characterizing conduct as wrongful appears not only in basic

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foundation of this rule is stated crisply in *Sinram* v. *Pennsylvania R.R.*, 61 F.2d 767, 770 (2d Cir. 1932) (Learned Hand, J.):

> But so long as it is an element of imposed liability that the wrongdoer shall in some degree disregard the sufferer's interests, it can only be an anomaly, and indeed vindictive, to make him responsible to those whose interests he has not disregarded.

[28] *See, e.g.*, Seavey, Mr. Justice Cardozo and the Law of Torts, 39 Colum. L. Rev. 20, 29-39; 52 Harv. L. Rev. 372, 381-91; 48 Yale L.J. 390, 399-409 (1939).

[29] *See, e.g., Palsgraf* v. *Long Island R.R.*, 248 N.Y. 339, 347, 162 N.E. 99, 101 (1928) (dissenting opinion of Andrews, J.); W. Prosser, Torts § 43 (4th ed. 1971).

[30] "Except only the defendant's intention to produce a given result, no other consideration so affects our feeling that it is or is not just to hold him for the result of foreseeability; and no other consideration so largely influences the courts." Edgerton, Legal Cause (pt. 2), 72 U. Pa. L. Rev. 343, 352 (1924). *Cf.* W. Prosser, Torts § 43, at 258 (4th ed. 1971).

tort doctrine but as well in other more specialized bodies of law.[31] It is a principle of pervasive influence.

Precedents relating to the scope of liability for violations of Title VII are consistent with this general principle of legal cause. Liability extends to harm that (1) was caused in fact by defendant's violation of Title VII - *see* 42 U.S.C. § 2000e-5(g), and *cf. Mt. Healthy City School District Board of Education* v. *Doyle, supra* (applying traditional "but for" test to a claim based on 42 U.S.C. § 1983) - and (2) was within the scope of the types of harm against which Title VII is directed. The latter limitation, as will be developed in subsection (2) below, has been derived from the manifest objectives of the statute and the mandates its expresses.

Before the objectives and mandates of the statute are examined, it may be useful to observe one additional point. Applying the legal cause standard to a particular case is a function ordinarily performed by the factfinder - jury or, in a nonjury case, trial judge. Only if reasonable persons, correctly understanding the legal standard, could not differ about the outcome of its application to the evidence presented in the particular case is the legal cause issue determined by the court as questions of law are determined. If reasonable persons might differ, the legal cause issue is determined by the factfinder. This determination is by nature, however, not a finding of pure fact but instead a common-sense evaluation of the evidence as measured by the applicable legal standard.

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[31] *E.g., Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977) (injury must be "of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful"); *A.D.M. Corp.* v. *Sigma Instruments, Inc.*, No. 80-1088 (1st Cir., Sept. 5, 1980) (sustaining district court finding that alleged injury was not "antitrust injury" in the absence of a showing that injuries, flowing from alleged business torts, had an unreasonable effect on competition) (citing III P. Areeda & D. Turner, Antitrust Law ¶ 737 (1978); *see also* II *id.* 333 *et seq.*).

Cf. W. Prosser, Torts § 45 (4th ed. 1971). Moreover, in whatever way one may express the standard, its application to any set of facts that produces disagreement among reasonable persons inherently involves an element of fiat that can be defended as reasonable but cannot be demonstrated by reason to have been the only possible outcome of faithful application of an authoritative rule of law to a given set of facts. Compare the opinions of Learned Hand, J., in *Sinram*, n.27, and Andrews, J., dissenting in *Palsgraf*, n.29, *supra*.

(2) The Scope of Legal Cause and the Scope of Available Relief in Title VII Cases

Issues concerning the existence of remediable harm are intimately related to issues of legal cause. Remediable harm in turn subsumes two subsidiary issues: (1) the existence of harm to the plaintiff; and (2) the availability of a legal remedy for that harm.[32]

In a Title VII action, by statutory directive, certain traditional legal remedies - for example, compensatory damages - are not available.[33] B. Schlei and P. Grossman, Employment

[32] In the present case plaintiff seeks declaratory relief establishing that her rights protected by Title VII have been violated. In addition, she seeks injunctive relief that would (1) restrain defendants "from taking any action which further interferes with plaintiff's right to equal employment" (Plaintiff's Complaint, p. 16); (2) require her appointment as a police officer in the City of New Bedford; (3) require the city defendants to institute "a recruitment system in which affirmative action is taken to provide an adequate rememdy for the defendants' past and present discriminatory practices (*id.*, p. 17)"; and (4) order back pay and retroactive seniority and benefits for plaintiff. Plaintiff also seeks costs and attorneys' fees.

[33] The point of departure for determining the legal remedy to which plaintiff is entitled is 42 U.S.C. § 2000e-5(g), which provides as follows:

Discrimination Law at 1258 (1976) (see 1979 Supplement at 338). This is at once a statement about the types of harm to which Title VII is directed and a statement about the scope of available relief, but the two are not necessarily identical. Thus, although the scope of relief does not extend to damages for the mental and emotional impact upon a plaintiff of a violation of Title VII, this does not necessarily mean that mental and emotional impact are beyond the types of harm to which Title VII is directed. It may instead mean only that if a remedy is allowed, it must be some remedy other than an award of monetary damages. This distinction between the scope of

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If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employer agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

Courts addressing the issue appear to have interpreted the use of the word "intentionally" in the statute to refer not to motivation but to knowledge of consequences. *See* B. Schlei and P. Grossman, *Employment Discrimination Law*, 1197 at n.2 (1976). This interpretation is in harmony with the Supreme Court's statement in

harm to which Title VII is directed and the relief available is well illustrated by the fact that harm in the nature of lost wages may be redressed in a Title VII action through an equitable award of backpay even though that same harm is not compensable through the legal remedy of monetary damages. This aspect of the standards relating to legal cause and remediable harm will be considered further in subdivision (3) below.

(3) Application of the Legal Standards To The Present Case

In the circumstances of this case, has plaintiff established that City defendants' violation of Title VII was a legal cause of remediable harm to her? If so, to what relief, if any, is she entitled?

On two occasions the minimum height requirement, the imposition of which violated Title VII for reasons stated in Part V-B, *supra*, was supplied to deny plaintiff an appointment she would have received but for application of this requirement. Thus, a but-for causal relationship between use of the minimum height requirement and nonappointment of plaintiff is established. In both instances, however, issues of legal cause and remediable harm are presented.

(a) Denial of Appointment from the Integrated List

When the city defendants applied the minimum height re-

Griggs v. *Duke Power Co.*, 401 U.S. 424, 432 (1971), that Title VII is directed "to the *consequences* of employment practices, not simply the motivation." (Emphasis in original.) *See Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975). In the present case, city defendants acted with knowledge of the consequences of disparate impact of the height requirement on women and therefore "intentionally engaged in . . . an unlawful employment practice" as that phrase is used in 42 U.S.C. § 2000e-5(g) even though, as stated in Part IV, *supra*, they did not act with "discriminatory purpose" in the sense relevant to plaintiff's § 1983 claim.

quirement to deny plaintiff an appointment from the integrated list, in competition with men as well as other women, the appointment that plaintiff would have received but for the minimum height requirement would have been an invalid appointment, since it would have been based on the erroneously high position of her name on the list due to the inadvertent error of placing her where she should have been if she had been a minority applicant. It is probable that the invalidity would have been discovered shortly after the appointment. It is also probable that the invalid appointment would have been rescinded promptly after discovery of its invalidity, though it is less clear that in the world of practical affairs plaintiff then would have had no better prospect of remaining on or being appointed to the city police force than if she had never received the invalid appointment. Thus, in this instance the application of the minimum height requirement was a but-for cause of plaintiff's being denied an *invalid* appointment, the invalidity of which probably would have become known shortly after her appointment and the practical value of which, speculative at best, would not have included a confirmed status on the city police force.

In the essentially evaluative application of the legal standards to the evidence concerning the failure to appoint plaintiff from the integrated list, the court finds that loss of the wages and benefits she would have received had she been *invalidly* appointed from the integrated list are not results within the scope of Title VII protection.

Albemarle Paper Co. v. *Moody*, 422 U.S. 405, 421 (1975), makes clear that "given a finding of unlawful discrimination, backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past

discrimination."[34] "The *Albemarle* presumption in favor of retroactive liability can seldom be overcome, but it does not make meaningless the district courts' duty to determine that such relief is appropriate." *City of Los Angeles* v. *Manhart*, 435 U.S. 702, 719 (1978).

Viewing the issue related to loss of wages and benefits resulting from the failure to receive an invalid appointment from the perspective of the *Albemarle* presumptive rule in favor of retroactive relief, the court concludes that this is not an instance in which it would be appropriate to award backpay or other retroactive relief. This claim for backpay and other retroactive relief is a claim for imposition of liability for a harm beyond the scope of the type of results against which Title VII is directed. At the time of the decision now under discussion, plaintiff would not have received a *valid* appointment even if the defendants had not discriminated against women. Thus, plaintiff suffered no loss of pay that would justify an award of backpay or other retroactive relief. Also, such relief has not been shown to be necessary in this instance to coerce compliance in the future, since the city long ago ceased to impose the height requirement. Nor can it be said that denial of such relief would "frustrate the central statutory [purpose] of eradicating discrimination throughout the economy," *Albemarle* v. *Moody Paper Co., supra*, at 421, by creating an incentive structure for the elimination of practices of dubious legality," *id.*, given the existence of a state statute authorizing imposition of a height requirement at the time the height requirement was applied in this instance to plaintiff, and the then-existing stage of evolutionary development in the interpretation of Title VII.

[34] Backpay serves the first of these purposes by creating an incentive to elimination of "practices of dubious legality" beyond that present merely in the prospect of injunctive relief. *Albemarle Paper Co.* v. *Moody, supra*, at 417. The connection of backpay with the "make whole" purpose is obvious. The same purposes served by backpay awards are served by other forms of retroactive relief.

These conclusions about backpay, retroactive relief, and relief aimed at coercing future compliance, however, fall short of demonstrating that plaintiff has sustained no harm at all within the types of results against which Title VII is aimed. The absence of proof that defendants' wrongful conduct caused economic harm, when she was not appointed from the integrated list because of application of the minimum height requirement, is not fatal to plaintiff's claim of actionable violation of a legally protected right. *Cf. Carey* v. *Piphus*, 435 U.S. 247, 266-267 (1978) (denial of procedural due process actionable under 42 U.S.C. § 1983 for nominal damages without proof of actual injury).[35] As already noted, in Part V-B, *supra*, plaintiff was a member of a group as to which the minimum height requirement had a significant negative disparate impact. She was rejected for a position on the police force because of application of this minimum height requirement. Without doubt she suffered mentally and emotionally, if not economically, from the application of that requirement through a period of time while the requirement was in use. Even though Title VII does not create a cause of action for damages for mental and emotional impact, and even though no other statutory or decisional basis for such an award can be identified (see Parts III and IV, *supra*), the existence of such harm bears upon the question whether she has met the legal cause and remediable harm elements of a cause of action for declaratory relief within the scope of the Declaratory Judgment Act, 28 U.S.C. § 2201, and Title VII. Even though city defendants abandoned the minimum height requirement in 1974, they have persisted, even to the present moment, in contending that no violation of plaintiff's rights under Title VII ever occured. In this context, the court concludes that

[35] There are, of course, instances entirely apart from Title VII and § 1983, in which proof of economic harm is not essential to existence of a legal remedy. *E.g., Morningstar* v. *Lafayette Hotel Co.*, 211 N.Y. 465, 105 N.E. 656 (1914) (Cardozo, J.).

mental and emotional impact constitutes harm sufficient to establish a right to a declaratory judgment that serves, consistently with the central objective of Title VII, the function of vindication. *Cf. Carey* v. *Piphus, supra,* at 266-267 (denial of procedural due process actionable under 42 U.S.C § 1983 for nominal damages without proof of actual injury). Plaintiff has established that the violation of Title VII by city defendants in this instance did produce a legally cognizable impact upon her for which she is at least entitled to declaratory relief setting that controversy at rest.

(b) Denial of Appointment from the All-Women List

In the second instance of application of the minimum height requirement to deny plaintiff an appointment, the appointment was made from an all-women list. This application of the minimum height requirement was a but-for cause of denial of plaintiff's appointment, but only in the context of a competition among women for an appointment. It might be argued, then, that plaintiff did not suffer harm from discrimination against women. However, the only reason that application of a height requirement produces a disparate impact upon women as a class is that it produces such impact upon the subclass of women who do not meet the height requirement. Thus, the action of city defendants in this case when they applied the height requirement to the selection from the all-women list was essential to maintaining the credibility of the height requirement in a broader context. To have abandoned application of the requirement in the all-women context would have been so inconsistent with their implicit position that the height requirement was job-related that it would have undercut fatally their position with respect to application of the height requirement to the integrated list.

For this reason, even though the discrimination based on the height requirement in the particular instance of its application to the all-women list was among women only, it was so intimately and integrally related to the broader use of the height requirement that the contention that it was not a cause of legally cognizable harm to plaintiff cannot be sustained. The compelling public interest manifested in the objectives of Title VII are best served by recognizing a cause of action for harm so integrally related to the defendants' use of a criterion of employment forbidden by Title VII. Accordingly, the court finds that in this instance the legal cause and remediable harm elements are satisfied not only for the reasons applying to denial of an invalid appointment from the integrated list - because of the mental and emotional harm suffered by plaintiff and because of her interest in vindication through declaratory relief - but also because but for application of the height requirement to the selection from the all-women list, plaintiff would have been on the police force under a valid appointment. The relief appropriate in this instance, therefore, may extend not only to declaratory relief but also to backpay to redress whatever pay advantage that appointment would have yielded to plaintiff. On the basis of the evidence in this case the court concludes that plaintiff has met her burden of proof to the extent of showing that it is more probable than not that she would have continued on the police force and would have received advances in pay and status no later than the time such advances were received by Jeanne Lawrence and Shirley Arsenault, who were appointed from the all-women list when plaintiff was rejected.

Weighing equities, the court denies plaintiff's claim for overtime. One factor the court has considered is the absence of bad faith on the part of the defendants. A second factor is that, though the opportunity to serve overtime is a significant incident of an appointment, any equitable claim to overtime

pay is undercut by the fact that it would be pay for time not served, and in these circumstances the "net" loss after taking account of alternative use of this time, in mitigation, is speculative. A third factor is the distinctive nature of the casual relation between the defendants' conduct and the plaintiff's harm in this case.

In structuring appropriate relief this court must take into account not only the interests of the parties but also the public interest. This constellation of interests will be best served in this instance by a decree that includes the following provisions: (1) The all-women list of 1974 will be reconstituted for one appointment to the New Bedford police force; if plaintiff satisfies other legitimate appointment criteria, including a physical examination, then as the highest ranking person on the reconstituted list she will be appointed and will be placed in the status for backpay, and the status for current and future pay, that she would have occupied had she been appointed at the same time as Jeanne Lawrence and Shirley Arsenault. (2) For purposes other than pay status plaintiff's lack of experience she would have had if she had served on the police force throughout the period since she was improperly denied appointment may be taken into account, in recognition of the public interest - for example, the public interest in assignments appropriate to her experience.

The parties will be directed to confer with respect to the drafting of the terms of an order consistent with these rulings and to submit an agreed proposal, or their respective proposals if they cannot reach agreement. The order will include a determination of the backpay award due under these rulings as well as directives regarding other conditions of the appointment, work assignments and future pay.

(4) The Arguments of Mootness and Lack of Standing

Defendants have argued that controversy over the 1974

violations is now moot and that plaintiff lacks standing to complain. Each of these contentions fails.

Plaintiff proved the essential elements of a cause of action in her favor. In particular, she proved that city defendants applied an unlawful minimum-height requirement to deny her an appointment and that their action was a legal cause of remediable harm to her. Once this cause of action came into being, as it did in August, 1974, it could not be destroyed by the city's abandonment of the height requirement as to the future. That later action may render moot a claim for particular forms of relief that might otherwise have been available, such as an injunction against future use of the height requirement. *Cf. County of Los Angeles* v. *Davis*, 440 U.S. 625 (1979). It did not render moot her claims for declaratory and injunctive relief with respect to the violations that had previously occurred. The cause of action for that relief had already ripened. Defendants have nevertheless persisted in contending that no violation of plaintiff's rights ever occurred. In these circumstances, even if the court had resolved the legal cause and remediable harm issues in the context of the failure to appoint plaintiff from the all-women list by concluding that plaintiff was entitled only to declaratory relief, defendants would not be in any position to assert that declaratory relief would be insubstantial or vacuous, even apart from its potential relevance to other relief such as an award of attorneys' fees (see Part V-C, *infra*). Nor can defendants' standing argument be sustained. To pursue defendants' standing argument to its logical conclusion would be to hold that the imposition of the height requirement could not be challenged in court until some woman less than 5 feet 6 inches tall scored sufficiently high on a civil service exam to be passed over on a certified list when her name was reached because of application of the height requirement. Surely this cannot be so when the mere existence of the height requirement might be ex-

pected to discourage otherwise qualified women from taking the civil service exam because of a self-recognized inability to meet the height requirement. *Cf. Dothard* v. *Rawlinson, supra,* at 330. As a female applicant for the position of police officer, plaintiff was a member of a group as to whom the height requirement had a sufficient negative disparate impact. The injury-in-fact component of the standing requirement[36] is satisfied by her status as a member of this group, even if problems of causation pose obstacles to granting all the relief she seeks.

(5) Plaintiff's Request for Injunctive Relief

Plaintiff's request for generalized injunctive relief restraining defendants "from taking any action which further interferes with plaintiff's right to equal employment" is not framed with sufficient particularity to avoid future disputes over its interpretation and is for that reason denied.

Plaintiff has not shown why it would be appropriate in the context of this action by an individual plaintiff to order what would appear to be classwide relief, the institution by the city defendants of an affirmative action program. Nor has plaintiff suggested how such a program, if ordered, should be structured. This request is denied.

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[36] As typically formulated, the doctrine of standing has two components: (1) injury in fact and (2) zone of interests. *E.g., Association of Data Processing Service Organizations* v. *Camp,* 397 U.S. 150 (1970). "The first question is whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise." *Id.,* at 152. The second question is "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Id.,* at 153. There can be no question here that plaintiff satisfies the zone-of-interest component. Defendants do not argue otherwise.

C. Attorney's Fees

Section 706(k) of Title VII, 42 U.S.C. § 2000e-5(k), authorizes the court in a Title VII action to allow the prevailing party a reasonable attorney's fee as part of costs. "[P]laintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Nadeau* v. *Helgemoe*, 581 F.2d 275, 278-279 (1st Cir. 1978). The degree of a plaintiff's success will affect the amount of attorney's fees awarded, not their availability. *Id.*

A prevailing plaintiff "ordinarily is to be awarded attorney's fees in all but special circumstances." *New York Gaslight Club, Inc.* v. *Carey*, 48 U.S.L.W. 4645, 4647 (June 9, 1980), quoting *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 417 (1978). *See Albemarle Paper Co.* v. *Moody*, *supra*, at 415. *See also Newman* v. *Piggie Park Enterprises*, 390 U.S. 400, 402 (1968). No "special circumstances" have been shown here that would justify a departure from the ordinary rule of allowing an award of attorney's fees to plaintiff.

ORDER

A hearing is scheduled for November 7, 1980, at 3:30 p.m., to address the following issue, in light of the findings and conclusions stated in this memorandum:

1. *Terms of Relief*
   (a) To what amount is plaintiff entitled as back pay?
   (b) What should be the precise nature and scope of other relief, including any directives regarding conditions of plaintiff's appointment and her status in the future in relation to pay and in relation to work assignments and other conditions of employ-

ment? Should the court, rather than attempting to fashion a detailed order regarding events that may occur during the customary probationary period for an appointee to the police force of New Bedford, retain jurisdiction during that period to resolve any controversy that may arise?

(c) To what extent, if any, should part or all of the relief run against one or more of the state defendants as well as the city defendants?

2. *Attorney's Fees*

(a) What would be a reasonable amount to award to plaintiff as attorney's fees?[37] Plaintiff should be prepared to offer evidence in support of any fees claimed, and defendants may offer evidence if they wish to do so. Such evidence may be offered by affidavit unless an oral evidentiary hearing is requested by one of the parties.

(b) Should all state defendants and all city defendants be required to contribute to the award of attorney's fees to plaintiff? If not, what is the basis for distinguishing among them, and what authorities support such distinction?

Robert E. Keeton,
United States District Judge

[37] The attention of the parties is directed to *King* v. *Greenblatt*, 560 F.2d 1024 (1st Cir. 1977), *cert. denied*, 438 U.S. 916 (1978), and its progeny and to *Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), relative to the factors to be considered by a district court in arriving at the amount to be awarded.